IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1637

CITY OF BURBANK, *et al.*,
Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANSWERING BRIEF OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, AS *AMICUS CURIAE*

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INDEX

TABLE OF AUTHORITIES

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The Port Authority of New York and New Jersey submits this brief in answer to that of the United States, appearing herein as *amicus curiae*. Regrettably, we must take sharp issue with the Government on the essential question of preemption. In our view the Government's position flies in the face of what is *demonstrably* Congress' unmistakable intent.

Argument

The heart of the Government's position is that the courts below erred in interpreting Congressional intent as preempting State and local police power regulation in the interest of aircraft noise abatement but not airport pro-

prietor regulation. Instead, the Government alleges that Congress did not intend to preempt the exercise of State and local police power over aircraft noise abatement restrictions at airports within their jurisdiction, but only intended to preempt their regulation of the flight of aircraft in circumstances where they have no jurisdiction over the airports used by such aircraft. On this basis, the Government now contends, contrary to the position which the FAA took below, that the City of Burbank could regulate aircraft operations at the Hollywood-Burbank Airport which lies within the City's geographical boundaries.

The Government's position is that Congress, in enacting the 1968 and 1972 Noise Abatement Amendments to the Federal Aviation Act of 1958, wished to preserve the right of every State in the Union to exercise its police power in order to regulate the type of aircraft which could use airports within the State (other than airports owned by the Federal Government) as well the hours during which such aircraft could operate. The Government would have us believe that while Congress in 1968 was allegedly concerned "about efforts by communities adjoining airports to impose restrictions impinging upon Federal regulation of aircraft flight" (Brief, p. 46), it, *nevertheless*, acknowledged the right of a State to circumvent this admittedly preempted area through the exercise of its police power over airports. Presumably, under the Government's theory, a State can use its police power (or delegate that power to its political subdivisions) to achieve what it considers to be the proper balance between (a) the right of airport neighbors to a satisfactory noise environment and (b) the degree of air commerce desired.[1]

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[1] Many local governments own and operate airports which are physically located in whole or in part within the boundaries of other units of government. For example, the Morristown Airport in New Jersey, which is now operating subject to a court imposed curfew, is located in the Township of Hanover. See *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A. 2d 692 (1969).

Since a State has jurisdiction over all privately and publicly owned airports within its boundaries, the Government has failed to explain what the Senate Committee and the Department of Transportation sought to achieve when they determined that after the passage of the 1968 Noise Abatement Amendment

> "State . . . governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." Senate Report No. 1353, p. 6.

The fact is that both the Senate Committee Report and the Department of Transportation accepted Judge Dooling's reasoning in *American Airlines, et al., Port of New York Authority, et al.* v. *Town of Hempstead,* 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd,* 398 F. 2d 369 (2d Cir. 1968), *cert. denied,* 393 U.S. 1017 (1969), that any regulation of aircraft noise (altitude restriction, noise limit or curfew) which denies aircraft the use of any portion of the navigable airspace is an attempt to control aircraft noise by regulating the flight of aircraft.

This is made crystal clear by the immediate contemporaneous construction which the FAA gave to the 1968 Amendment. In the preamble to its first regulation under the Amendment, the FAA specifically concluded that airport regulation of aircraft noise, of necessity, involves the regu-

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New Haven's Tweed Airport is partially located in East Haven (clear zones and avigation easements). See *Town of East Haven* v. *Eastern Airlines, Inc.*, 331 F. Supp. 16 (D. Conn. 1971), supplementary opinion, 333 F. Supp. 338 (D. Conn. 1971), *aff'd,* ___ F. 2d ___ (2d Cir. 1972). Most county airports are located in other political subdivisions of the State which have jurisdiction over the airport for certain purposes. See *Town of Harrison* v. *County of Westchester,* 13 N.Y. 2d 258, 196 N.E. 2d 240 (1963). In addition, airports owned by Los Angeles, California, Philadelphia, Pennsylvania, Tulsa, Oklahoma, Toledo, Ohio, Phoenix, Arizona, Jackson, Mississippi, Orlando, Florida, San Francisco, California and Atlanta, Georgia are partially or wholly located outside the political jurisdiction of the public airport operator.

lation of aircraft flight. The preamble pointed out that the FAA:

> ". . . does not recognize any right of any State or local government agency that is not an airport proprietor to issue any regulation *controlling the flight of aircraft for noise purposes.*" 34 Federal Register 18356, Nov. 18, 1969. (Emphasis added.)

The Department of Transportation also equated airport noise regulation with airspace regulation in a legal opinion which it filed in 1971 with the Supreme Judicial Court of the Commonwealth of Massachusetts, urging the invalidity, on the grounds of Federal preemption and burden on commerce, of a proposed State law prohibiting the operation of certain noisy supersonic aircraft at airports within the Commonwealth.[2]

In that opinion, the Department of Transportation (together with the FAA) stated that the proposed law:

> "In its practical effect . . . is an attempt by the legislature to regulate air traffic and airspace. It is no less an attempt at such regulation than a local ordinance purporting to regulate the altitude of flight (as in the *Audubon Park* case, *supra*, and the *Cedarhurst* case, *supra*.) or the permissible noise levels of aircraft (as in *Hempstead*, 398 F.2d 369). Indeed, Senate Bill No. 1161 constitutes the ultimate regulation. By banning supersonic transport takeoffs and landings, it completely forbids a certain type of air traffic and a certain use of airspace." Exhibit A attached hereto, p. 1a, 10a.

Moreover, the Department of Transportation used the legislative history of the 1968 Noise Abatement Amendment to support its contention that the proposed act was a regulation of the flight of aircraft which was preempted by the Federal Government. (Exhibit A, p. 11a.) The De-

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[2] See *Opinion of the Justices*, _____ Mass. _____, 271 N.E. 2d 354 (1971).

partment pointed out, however, that the same legislative history:

> ". . . recognized that State and local agencies as airport proprietors might limit the use of their airports on a nondiscriminatory basis." Exhibit A, p. 11a.

We respectfully submit that this earlier interpretation by the Department of Transportation of the legislative history of the 1968 Noise Abatement Amendment is the correct one.

The Government also argues that this Court should not give the legislative history of the 1968 Amendment its plain meaning because neither the Department of Transportation nor Congress focused upon the distinction between airport control in a proprietary capacity and airport control by means of the exercise of the police power. (Brief, p. 45.) This argument is contrary to the clear legislative record.

Both the oral and written statements of the appellee, Air Transport Association of America, submitted at the House Hearings on H.R. 3400 (the 1968 Noise Abatement Amendment) were directed to this distinction.[3] The ATA statement, urging adoption of its substitute bill as well as its request for full Federal preemption of the aircraft noise field, stated that:

> "To date, local attempts to regulate aircraft noise have been limited. Those which have rested on an asserted exercise of the police power have been uniformly held invalid, as an undue and ureasonable burden on interstate commerce or as invading an area uniquely committed to Federal care." House Hearings on H.R. 3400, p. 100. (Citations omitted.)

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[3] Hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce on H.R. 3400 and H.R. 14146, Aircraft Noise Abatement, 90th Cong., 1st and 2d Sess., p. 91, 100-101.

The ATA statement went on to point out that:

> "... the principal problem in attempted local regulation has not been by way of noise ordinances adopted under the police power, but purported 'lease conditions' imposed by the airport operator as landlord. For example, the Port of New York Authority's well-known '112-PNdb' rule is enforced against carriers operating at the New York airports, under the alleged right of the Port as operator of the airport to control the conditions of its use." *Id.*

After reviewing the cost to the airlines of complying with the Port Authority's jet terms and conditions, the ATA statement went on to emphasize the necessity for clear preemption covering Port Authority restriction because:

> "Until now, the New York airport regulation has been upheld by the courts as not in conflict with any existing Federal certification or regulation." *Id.* (Citations omitted.)

The letter from the Department of Transportation to the Chairman of the Committee on Interstate and Foreign Commerce, dated March 1, 1968 (House Hearing pp. 8-10) was specifically directed to the ATA's request that the airport proprietors' restrictions be preempted. In that letter (a copy of which is attached to the Government's brief as Appendix B) [4] the Department of Transportation not only directed itself to the right of the airport operator to limit aircraft noise in the exercise of its proprietary functions, but also recommended that such authority continue. The letter states:

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[4] The copy of the Department of Transportation letter of March 1, 1968, addressed to the Chairman of the House Committee on Interstate and Foreign Commerce is reprinted in the Hearings held by that Committee's Subcommittee on Transportation and Aeronautics on H.R. 3400 at pp. 8-10 (See footnote 3). The copy of the letter set forth in the Government's brief as Appendix B is addressed to the Chairman of the House Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce.

> "As a practical matter, and as ATA concedes in its testimony, the only regulatory authority left to local communities or airport operators is the authority of the airport operator, *in the exercise of its proprietary function,* to limit on noise grounds the kind of aircraft which may use its facility. The Department is firmly convinced that such authority in the airport operator should continue." House Hearings on H.R. 3400, p. 9; Appendix B to Government's Brief, p. 67. (Emphasis added.)

Moreover, Judge Dooling's opinion in the *Hempstead* case, 272 F. Supp. 226, 233-34, which the Secretary and Senate Committee used to define the nature and scope of Federal preemption in the aircraft noise field, also deals with the legal difference between a local police power enactment such as the Hempstead ordinance and a landlord's restriction on aircraft users such as the Port Authority's noise limits and nighttime runway limitations.

Finally, the distinction between police power and an airport operator's regulations was fully explored at the so-called Harris Committee Hearings held in 1959-62 before the Subcommittees of the Committee on Commerce, House of Representatives, 86th and 87th Congress. At these hearings, my predecessor, in discussing the Port Authority's jet noise restrictions, advised that the legal basis for such restrictions was the:

> ". . . power [that] inheres in the very nature of the property ownership and control and unless surrendered by contract is possessed by all owners or operators of real property." Hearings, p. 657.

He further explained that the assertion of the Port Authority's power to restrict the use of its airports for noise abatement purposes:

> ". . . was not an assertion . . . of any legislative power. It was a common-law right which inheres to the owner and operator of land." *Id.*

The Senate Committee on Commerce was fully aware that the Harris Committee Hearings had been held and

indeed referred to them in its Report on H.R. 3400. (Report No. 1353, p. 2.) Furthermore, it must be assumed that when the Secretary of Transportation, Alan S. Boyd, wrote to the Chairman of the Subcommittee on Aviation of the Senate Committe on Commerce on June 22, 1968, defining the nature of Federal preemption in the aircraft noise field, he did so with full knowledge of the meaning of the terms in question. As a matter of fact, the Secretary himself participated in the Harris Committee Hearings. (Hearings, pp. 496-540.)

Although the Harris Committee Hearings and Report are useful in determining the knowledge possessed by the Secretary of Transportation and the Senate Committee when they explored the question of Federal preemption in the aircraft noise field, the Government is wrong (Brief, p. 24-30) in using this material to shed light on the interpretation of the Federal Aviation Act of 1958, since no legislative action had been taken thereon. Judge Dooling's well-reasoned conclusion on this point in *Hempstead* is irrefutable. 272 F. Supp. 226, 234.

The Government is also in error in asserting that Congress enacted the Noise Control Act of 1972 upon the assumption that local police power curfews at airports had not been preempted (Brief, p. 41). On the contrary, it must be presumed that Congress acted not only with knowledge of the uniform contemporaneous construction that such police power regulations had been preempted (Port Authority principal brief, p. 16), but also with knowledge that both the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit had invalidated the Burbank nighttime curfew on the ground of preemption and that the FAA had urged such a holding.[5]

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[5] Congress also enacted the Noise Control Act of 1972 with knowledge of the opinion rendered in *Opinion of the Justices*, _____ Mass. _____, 271 N.E. 2d 354 (1971), in which the Court held that a proposed police power statute barring the operation of noisy supersonic aircraft at Massachusetts airports was invalid

Conclusion

In light of the reasons set forth both here as well as in our principal brief, we respectfully submit that the decision below should be affirmed.

Respectfully submitted,

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January 30, 1973

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under the Supremacy Clause. Although the Court questioned, by way of *dictum*, the right of an airport proprietor to ban the supersonic aircraft from its airport, we submit that this observation stemmed from the fact that the DOT-FAA brief failed to advise the Court that the FAA's Advanced Notice of Proposed Rule Making (ANPRM) on civil supersonic aircraft noise type certification standards, published August 6, 1970, specifically recognized the authority of the airport proprietor to regulate supersonic aircraft. 35 Fed. Reg. 12555-56, see Port Authority principal brief, pp. 14-15.

The ANPRM on civil supersonic aircraft noise standards reflects the Congressional determination that uniformity in the aircraft noise field is neither necessary nor desirable and that an airport proprietor's restrictions in this area would in fact aid the growth of air commerce. Hearing before the Aviation Subcommittee of the Senate Committee on Commerce, 90th Cong., 2d Sess., pp. 24-28, 34-39. Such a determination by Congress pursuant to its commerce clause powers has always been respected by this Court. *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421 (1856); *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946); See also *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945).

Proof of Service

I, PATRICK J. FALVEY, a member of the Bar of the Supreme Court of the United States, and General Counsel of The Port Authority of New York and New Jersey, appearing herein, *Amicus Curiae*, hereby certify that on the 30th day of January, 1973, I served copies of the foregoing brief on counsel for Appellants, counsel for Appellees, counsel for the State of California, *Amicus Curiae*, counsel for the United States, *Amicus Curiae*, counsel for the National Business Aircraft Association, Inc., *Amicus Curiae*, and counsel for the Air Line Pilots Association, International, *Amicus Curiae*, by mailing three copies thereof in a duly addressed envelope, with air mail postage prepaid, to each of the following in this cause:

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EXHIBIT A

SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS

In the Matter of Senate Bill No. 1161 (as amended) Pending Before the House of Representatives of the Commonwealth of Massachusetts

OPINION OF
THE DEPARTMENT OF TRANSPORTATION
AND
THE FEDERAL AVIATION ADMINISTRATION

Pursuant to leave of the Court, the General Counsel of the Department of Transportation and the General Counsel of the Federal Aviation Administration submit the following legal opinion.

The House of Representatives of the Commonwealth of Massachusetts by Order No. 5382 dated 20 April 1971 has requested the opinion of the Honorable Justices of this Court upon the question of the constitutionality of Senate Bill No. 1161 (amended) if enacted into law.

The Journal of the House for Tuesday, 20 April 1971, contains the amended language of Senate Bill 1161, "An Act prohibiting supersonic transport planes from landing or taking off in the Commonwealth," which reads:

> "Notwithstanding the provision of any law, unless there is an emergency, no commercial supersonic transport plane which is not capable of limiting its noise level to one hundred and eight decibels or less while landing, on the ground, or taking off, will be permitted to land or take off in the commonwealth."

The Court by Announcement dated 30 April 1971 invited the filing of briefs by interested persons.

This opinion urges this Court to find in its Advisory Opinion concerning the question of law presented by the House of Representatives that the Commonwealth of Massachusetts is not constitutionally competent to enact any law which regulates or prohibits the operation of supersonic aircraft at airports within the Commonwealth of Massachusetts, for the reasons that the Federal Government has preempted the regulation of airspace and aircraft operations, and because the Commerce Clause of the United States Constitution requires that air commerce be regulated by a single authority, the Congress of the United States.

I. The Federal Government has so Preempted the Regulation of Airspace and Aircraft Operations as to Preclude Enforcement of Senate Bill No. 1161.

A. The Federal Scheme is Comprehensive and Pervasive.

Through a series of enactments and regulations, the federal government has asserted a broad authority to control and regulate use of the navigable airspace and aircraft operations. The principal statute is the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542, as amended.

1. *The Federal Aviation Act of 1958.* Under this Act, the United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." (49 U.S.C. § 1508(a)) Each citizen of the United States is granted the "right of freedom of transit through the navigable airspace of the United States." (49 U.S.C. § 1304) "Navigable airspace" is defined in the Act as all airspace "above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." (49 U.S.C. § 1301 (24))

To facilitate transit through the air in a safe and efficient manner, the Act established the Federal Aviation Administration (FAA), headed by an Administrator, and conferred upon that agency broad powers to regulate air commerce in the "public interest." (49 U.S.C. §§ 1303, 1341(a), 1348) Matters enumerated by the Act as being part of the "public interest," include "the regulation of air commence . . . to best promote its development and safety and fulfill the requirements of national defense"; "the control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of safety and efficiency"; "the development and operation of a common system of air traffic control and navigation for both military and civil aircraft." (49 U.S.C. § 1303)

In order to fulfill the broad mandate of the Act, the Act confers upon the Administrator of the FAA equally broad powers over all aspects of the navigation of aircraft. Thus the Administrator is authorized, among other things, to develop plans and formulate policy with respect to the use of navigable airspace and allot the use of such airspace as he deems proper (49 U.S.C. § 1348 (a)); prescribe rules governing the flight of aircraft, including rules for the efficient and safe use of navigable airspace as well as "for the protection of persons and property on the ground." (49 U.S.C. § 1348(c)); promote air commerce by establishing and maintaining air navigation facilities (49 U.S.C. § 1303(d), 1348(b)); conduct tests and undertake research and development of aircraft and aircraft equipment (49 U.S.C. § 1353(b)); and prescribe certain types of equipment aircraft must utilize (49 U.S.C. § 1423(a) (1)).[1] In

[1] Scheduled airlines in addition to regulation by the FAA are also subject to regulation by the Civil Aeronautics Board. (C.A.B.). Thus, before an air carrier may engage in air transportation and be subject to operational and navigation regulation by the FAA, the airline must secure a certificate from the C.A.B. permitting it to engage in air transportation. (49 U.S.C. § 1371).

addition to these express enumerated powers, the Administrator is given the authority generally to issue such orders, rules and regulations as he deems necessary to execute his duties and carry out the provisions of the Act. (49 U.S.C. § 1354(a))

2. *The 1968 Amendment.* Among the most important amendments to the Federal Aviation Act is that added by Public Law 90-411, 82 Stat. 395 (1968) pertaining to aircraft noise and sonic boom. (49 U.S.C. § 1431) Under the amendment, the Administrator is required to prescribe such standards, rules, and regulations as he may find necessary for the control and abatement of aircraft noise. In so doing, the Administrator must consider *inter alia* whether any proposed standard, rule or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest and whether it is economically reasonable and technologically practical and appropriate for the type of aircraft to which it will apply.

3. *Regulations under the Act.* Pursuant to his broad authority, the Administrator has issued numerous complex and detailed rules and regulations governing air navigation. See Title 14, Code of Federal Regulations, especially Parts 71, 73, 75, 77, 91, 93, 95, 97. As part of the regulatory scheme established by the FAA to assure the orderly flow of air traffic, the Administrator has divided the navigable airspace above the United States into various "control areas" and "control zones." (14 C.F.R. 1.1, 71.7, 71.11) Each of the designated control areas and zones has been assigned a different use. For example, the airspace from the surface up to 2,000 feet above the surface within a horizontal radius of five statute miles from the geographical center of any airport having a control tower, is designated "airport traffic area" and is reserved exclusively for the takeoff and landing of aircraft at the airport. (14 C.F.R. 1.1, 91.85(b)) Other examples of designated

airspace include "jet routes" which are located between 18,000 feet and 45,000 feet above mean sea level and "federal airways," each eight miles wide and located between 700 feet above the surface of the earth to 18,000 feet above mean sea level (14 C.F.R. 75.1, 75.11, 71.3, 71.5.

All aircraft operating within the navigable airspace must comply with the general operating and flight rules of the FAA (14 C.F.R. 91). At airports with control towers operated by the United States, such as the Logan International Airport at Boston, all operations to, from, or on the airport are regulated by the FAA in an effort to maintain traffic separation and avoid collision. Landings and departures, which are permitted only after clearance is obtained from FAA personnel, are made pursuant to procedures and regulations of the FAA which prescribe in detail such items as route of the aircraft approaching or leaving the airport, its angle of flight, altitude at any given point, speed, and the runway the aircraft may use. (e.g., 14 C.F.R. 91.79; 91.85; 91.87; 91.116; 91.117; 91.119; 91.121; 97.1) Standard instrument approach procedures for airports, such as Logan International, are published as regulations by the FAA and are available to each pilot in the form of charts. (14 C.F.R. 97) Standard Instrument Departure Procedures established by the FAA for Logan International Airport are published by the Coast and Geodetic Survey and when incorporated in a departure clearance issued by the Tower must be complied with by the pilot. (14 C.F.R. 91.87(h)). Logan International Airport has a runway noise abatement system (14 C.F.R. 91.87 (g)), and procedures have been established by the Tower designed to reduce the community exposure to noise to the lowest practicable minimum. Although the Logan International noise abatement procedures are not mandatory on the part of pilots they are followed by FAA controllers in regard to the issuance of clearance to all large (over 12,500 pounds) aircraft and all turbine powered aircraft.

To assure no deviation from FAA procedures and regulations, all pilots operating within an airport traffic area are required to maintain two-way radio communications with the control tower and to comply with all clearances issued by the control tower. (14 C.F.R. 91.75(a), (b); 91.87(b), (h)) Air traffic outside of the airport traffic area is similarly regulated by the FAA to maintain proper aircraft separation, with the FAA having the authority to set route and altitude restrictions for aircraft operating between airports. (See e.g., 14 C.F.R. 71.1, 75.1, 91.79, 91.81, 91.119(a), 1.121(a), 91.123(a), (b), 95.1)

Although as a general rule a pilot must follow all the regulations, procedures and instructions of the FAA, the FAA recognizes that the primary responsibility and authority for the safe operations during flight time of an aircraft rests with the pilot in command. (14 C.F.R. 91.3(a), 121.533(e), 121.535(d), 121.537(d)) Accordingly, a pilot in command is expressly authorized to deviate from certain of the general operating and flight rules to the extent necessary for the safety of the operation. (14 C.F.R 91.3(b)) This placing of primary responsibility for safe operation upon the pilot in command is consistent with the long standing practice in aviation for the safety of its operation and in recognition of the fact that final decisions must be made whenever possible by the pilot.

The Administrator has promulgated aircraft type certification regulations in accordance with his responsibilities in the field of noise control and abatement. (14 C.F.R. 21, 36, 34 F.R. 18355-18379) and under the authority of Public Law 90-411, *supra*. On 10 April 1970, the Administrator issued a Notice of Proposed Rule Making to adopt a new Federal Aviation Regulation 91.55 in regard to sonic boom by civil aircraft. (35 F.R. 6189, April 16, 1970) Under consideration at the present time are proposed regulatory actions (Advance Notice of Proposed Rule Making, 35 F.R. 16980, 4 November 1970) relating to the retro-

fitting of subsonic transport and turbojet powered aircraft for the purpose of reducing noise at the source. Further, FAA studies are continuing in regard to the changing of operating procedures for present day subsonic transport and turbojet powered aircraft to reduce to an absolute minimum the noise effect without retrofit.

4. *National Environmental Policy Act of 1969,* Public Law 91-190, 83 Stat. 852, approved January 1, 1970, states that it is national policy to encourage productive and enjoyable harmony between man and his environment. To this end Congress declared it is the continuing policy of the Federal Government in cooperation with State and local governments and others, to use all practicable means "to foster and promote the general welfare, to create and maintain conditions under which man and nature exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. Accordingly, all agencies of the Federal Government are required under the Act to review all their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies which prohibit full compliance with the national policy expressed by Congress and to report to the President by July 1, 1971.

5. *Airport and Airway Development Act of 1970.* The Congress exercised further authority in the field of aviation by the enactment of Public Law 91-258, 84 Stat. 219 (May 21, 1970). Title I of that Act, the "Airport and Airway Development Act of 1970," authorizes the Secretary of Transportation to make grants of $840 million for public airport development over a four-year period (§ 14b). This Title also requires airports which serve air carriers certificated by the C.A.B. to obtain an airport operating certificate from the Administrator (§ 612). Such cer-

tificates can be issued only after a finding by the Administrator that the Airport is "properly and adequately equipped and able to conduct a safe operation." Title II of the new Act provides for new or increased taxes to be imposed on virtually all users of the airport and airway system. These taxes would be placed in an "Airport and Airways Trust Fund" to be expended under the Act for airport planning, airport development and airways facilities in accordance with a National Airport System Plan to be prepared by the Secretary of Transportation.

B. Enactment of Senate Bill 1161 would be Invalid Because It Seeks to Regulate a Field Preempted by Congress.

Congress, through the enactment of comprehensive legislation indicating an intention to "occupy . . . the field," may "preempt" the field to the exclusion of local regulation. *Hines* v. *Davidowitz*, 312 U.S. 52, 67; *Pennsylvania* v. *Nelson*, 350 U.S. 497, 502. The principle of preemption is fully applicable to the area of regulation of interstate commerce. See, e.g., *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767; *Campbell* v. *Hussey*, 368 U.S. 297.

The Supreme Court has advanced three tests for determining whether the federal government has preempted an area: (1) whether the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; (2) whether federal regulation "touch a field" in which the federal interest is dominant in the federal system; and (3) whether the enforcement of local enactments on the same subject may produce a result inconsistent with the objective of federal law. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230. See also *Pennsylvania* v. *Nelson*, supra, at 502-502. Each of these tests is clearly satisfied in this instance.

First, the scheme of federal regulation of air commerce is "comprehensive" and "extensive." *Chicago and Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U.S. 103, 105; *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303. The broad scope of federal regulation of the use of airspace and of air traffic is readily apparent from the statutes and regulations quoted above. The extent of this regulation is such that Congress could not have anticipated that states or cities would step in and try to exercise their own brand of regulation.

Second, the federal legislation regulates an area in which the federal interest is dominant. The Constitution, Article I, section 8, confers upon Congress the exclusive power to regulate interstate and foreign commerce. It is the federal government that is charged with responsibility of assuring the free flow of commerce by establishing uniform procedures prescribed by a single authority for the safe and efficient use of navigable airspace. See *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292; cf., *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 766-67. Senate Bill No. 1161 purports to regulate air traffic and use of airspace and therefore has a direct impact upon interstate and foreign commerce which is the concern of the national government. Since "exclusive federal regulation in order to achieve uniformity vital to the national interest" is required, local legislation must give way to the overriding federal interest in this area with regard to air commerce. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 144.

The third test of preemption is met here in that local regulation in the field in which the legislature seeks to legislate necessarily produces a result inconsistent with the objectives of federal legislation. In enacting the Federal Aviation Act, it was the intention of Congress to establish the right of every citizen to freedom of transit through the

navigable airspace of the United States and to facilitate the exercise of that right by a federal regulatory scheme which promotes safe and efficient air commerce. The enactment of an ordinance or law by a local government that has the effect of prohibiting airplanes from using navigable airspace obviously is inconsistent with the objectives of federal law. Accordingly, local legislation with objectives different that those Congress has sought to achieve must yield.

The conclusion that Senate Bill No. 1161 purports to regulate an area preempted by legislation of the national government finds support in prior decisions holding that the federal government has preempted the area of regulation of air traffic and use of airspace. See *American Airlines, Inc.* v. *City of Audubon Park*, 297 F. Supp. 207 (W.D. Ky. 1968), aff'd, 407 F. 2d 1307 (6h [sic] Cir. 1969); *American Airlines, Inc.* v. *Town of Hempstead*, 272 S. [sic] Supp. 226, 232-33 (E.D. N.Y. 1967), affirmed without reaching preemption issue, 398 F. 2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); *Allegheny Airlines, Inc.* v. *Village of Cedarhurst*, 238 F. 2d 812, 814-15 (2d Cir. 1956).

In its practical effect, Senate Bill No. 1161 is an attempt by the legislature to regulate air traffic and airspace. It is no less an attempt at such regulation than a local ordinance purporting to regulate the altitude of flight (as in the *Audubon Park* case, *supra*, and the *Cedarhurst* case, *supra*.) or the permissible noise levels of aircraft (as in *Hempstead*, 398 F. 2d 369). Indeed, Senate Bill No. 1161 constitutes the ultimate regulation. By banning supersonic transport takeoffs and landings, it completely forbids a certain type of air traffic and a certain use of airspace.

Recent congressional action shows an intent to further preempt the field of regulating airspace and airports. As pointed out above, Congress in 1968, amended the Fed-

eral Aviation Act of 1958, to charge the Administrator of the FAA with responsibility for the issuance of rules necessary to provide for the control and abatement of aircraft noise. (Public Law 90-411, July 21, 1968) In doing so Congress recognized that local governments had a continuing responsibility not affected by Public Law 90-411, to assure compatible land use through the exercise of land use planning and zoning powers as a necessary part of the total attack on aircraft noise (Senate Report No. 1353, July 1, 1968, U.S. Code Cong. and Adm. News (1968), 2474, 2484). The Report concurred in the views expressed by the then Secretary of Transportation in a letter to the committee dated June 22, 1968, that "H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." The same letter recognized that State and local agencies as airport proprietors might limit the use of their airports on a nondiscriminatory basis. Moreover, the new "Airport and Airway Development Act of 1970" (Public Law 91-258, July 1, 1970), summarized above, is even more comprehensive than the Federal Airport Act of 1946. These recent statutes should remove any doubt which may have existed as to federal preemption of regulation of air traffic or use of airspace.

In sum, Senate Bill No. 1161 cannot stand because it results in a regulation of the use of airspace and of air traffic. Since the federal government "has taken the particular subject in hand," the Commonwealth is precluded from enforcing its legislation. *Charleston & W. C. Ry.* v. *Varnville Furniture Co.*, 237 U.S. 597, 604. This result follows "however commendable . . . different" the purpose of the local regulation. *Napier* v. *Atlantic Coast Line R.*, 272 U.S. 605, 613.

II. Senate Bill No. 1161 Is Invalid Because the Commerce Clause Requires That Air Commerce Be Regulated By A Single Authority.

In the foregoing section, we have demonstrated that the comprehensive nature of the federal legislation in regulating air traffic and the use of navigable airspace has preempted this field for the national government to the exclusion of local governments. We now show that even if the federal legislation did not preempt that area, Senate Bill No. 1161 would still be invalid as the Constitution itself confers upon Congress the exclusive power to regulate such commerce.

It is settled that the Commerce Clause of the Constitution affords protection from state legislation inimical to national commerce, even in the absence of congressional action. *Southern Pacific Co.* v. *Arizona,* 327 U.S. 761, 769. Ever since *Gibbons* v. *Ogden,* 9 Wheat 1, the states have not been deemed to have authority to . . . "regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Id.* at 767.

A local ordinance or regulation seeking to impose supersonic transport prohibition is a vivid illustration of the need to have regulation of airspace and air traffic under a single authority. Such regulation cannot be considered solely "in the accident of its particular circumstances." *American Airlines, Inc.* v. *Town of Hempstead,* 272 F. Supp. 266, 231-232 (E.D. N.Y. 1967), for, if upheld, it would likely spread to other major airports and the inevitable result would be to hobble the supersonic aircraft as an instrument of national and world transportation.

Air transportation, perhaps more than any form of commerce, requires regulation by a single authority. Even before 600-mile per hour flights became the custom, Congress recognized this need by the establishment of the

Federal Aviation Agency. It would indeed be a harmful and regressive step to permit a compromise of the FAA's authority through permitting the enforcement of local laws or regulations regarding the use of navigable airspace.

Conclusion

Senate Bill No. 1161, the Act now pending in the Legislature of the Commonwealth of Massachusetts, is invalid since it attempts to regulate in a field preempted by Congress and because the Commerce Clause of the Constitution requires that air commerce be regulated by a single authority, the Congress of the United States. Its effect would be to place a burden on interstate and foreign commerce, by prohibiting the operation of a certain aircraft type at at least one major interstate and international air terminal, which terminal (Logan International Airport) is a vital part of the National Airport System. A proliferation of this type of local regulation could eventually stagnate and destroy the national air transportation system. Senate Bill No. 1161 is therefore repugnant to the Federal Aviation Act of 1958 and the Airport and Airways Development Act of 1970, and they cannot be reconciled.

Respectfully submitted:

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TABLE OF CONTENTS

CITATIONS

Cases

Statutory Materials

Regulations

Congressional Materials

Secondary Material

International Materials

Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1637

THE CITY OF BURBANK, et al.,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., et al.,

Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF OF THE APPELLEES IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On January 11, 1973, four days before this case had been scheduled for oral argument, the Solicitor General filed a brief for the United States as *amicus curiae* supporting appellant, the City of Burbank. Noting that the Federal Aviation Administration had supported the appellees in both courts below, the Solicitor General said that the reversal of position contained in the brief "reflects the views of the Department of Transportation, of which the FAA is a constituent agency" (Br. 4).

This Court, having been informed a few days earlier of the Solicitor General's intention, postponed argument until February 20, 1973. The postponement has enabled appellees to file this supplemental brief in response to the *amicus curiae* brief for the United States.

SUMMARY OF ARGUMENT

I. Airspace Management

A. Although the brief for the United States reverses the position taken by the Federal Aviation Administration in the courts below, it nevertheless recognizes that "airspace management" is an exclusively federal responsibility (Br. 8, 12). Airspace management is a comprehensive concept which includes regulation of the air traffic flow from the surface of air carrier airports such as Hollywood-Burbank into the navigable airspace. If the federal government is to be an effective airspace manager, it seems inescapable that it must be able to utilize the airspace 24 hours a day without the handicap of severe and cumulatively debilitating restrictions imposed by local governments. While appellees do not contend that all airports must be treated alike or that curfews are never appropriate, we urge that restrictions so crucial to the system must come from the agency entrusted by Congress with all aspects of airspace management, the Federal Aviation Administration.

Congestion with its attendant threat to safety and efficiency stands out as a major problem for the nation's air transportation system. A substantial limitation on the hours during which aircraft operations are permitted will result in increased congestion during the remaining hours. Moreover, curfews compromise airspace management by acting as a blockade on traffic flow, which extends beyond the hours of the ban and affects all terminals with connections to the restricted airport. Under the Federal Aviation Act, a restriction on the national air transportation system having such adverse consequences should be imposed, if at all, by a centralized authority able to weigh the multiple national interests involved and to make adjustments necessary to keep the system operating efficiently.

B. Twice within the last five years, Congress has deliberately reaffirmed its decision, initially taken in 1958, to place the Government's regulatory authority over aircraft noise in the FAA rather than some other agency. Act of July 21, 1968, Pub. L. No. 90-411, 82 Stat. 395; Noise Control Act of 1972, Pub. L. No. 92-574, §7, 86 Stat. 1239. Thus there is special significance to the *amicus curiae* briefs filed on behalf of the FAA in each of the lower courts. These briefs express the responsible federal agency's conviction that local curfew ordinances would aggravate congestion, interfere with efficient airspace management, and thwart the intention of Congress.

In addition, the FAA has publicly opposed the imposition of curfews on commercial jet operations from the beginning of the jet age in 1959 to the present time. This long standing opposition to local restrictions on the use of navigable airspace demonstrates the inaccuracy of the Government's contention (Br. 52) that any rejection by the FAA of night curfews as a noise abatement measure would have represented "a major change in federal policy."

II. Preemption

The brief for the United States founders upon the fundamental misstatement of three key elements of the legislative history of the Federal Aviation Act.

A. The Government erroneously asserts that the regulation of aircraft noise was not the subject of any congressional enactment prior to 1968 (Br. 23-24). The legislative history demonstrates conclusively that the FAA's broad authority to make regulations "for the protection of persons and property on the ground" was written into the 1958 Act as a direct result of congressional concern with aircraft noise in the vicinity of the nation's airports.

B. Under the 1958 Act, Congress intended to vest authority for all aspects of airspace management once and for all in the Administrator of the FAA. To permit a local entity with "any jurisdictional tie" to an airport to disallocate airspace by imposing a night curfew, as urged by the United States (Br. 46), would fractionalize the authority for airspace management in direct opposition to the congressional purpose.

C. The brief for the United States incorrectly asserts that the legislative history has not focused on the distinction between airport control by a proprietor and airport control through the exercise of police power (Br. 45). It was precisely this distinction that was advanced by the Secretary of Transportation and concurred in by the Senate Commerce Committee in 1968. While preserving certain rights for airport proprietors, the Committee said that "State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." S. Rep. No. 1353, 90th Cong., 2d Sess. 6 (1968). The Government has taken a "selective" view of the legislative history which ignores this declaration of congressional intent, attempts to characterize the proprietary-police power distinction as an invention of the court of appeals, and then argues that the distinction is not valid (Br. 36 n.27, 44-48). This constitutes a transparent attempt to rewrite legislative history and thereby to thwart the explicit intention of Congress.

The Government argues that the proprietary-police power distinction would lead to the "bizarre result" of a federal preemption policy that applies only to private airports (U.S. Br. 45-46). This argument assumes that Congress intended to preempt police power regulation only in the rare situation where the airport is not owned by a local governmental entity. Viewed correctly, however, the federal preemption intended by Congress applies nation-

wide to all airports irrespective of the character of their ownership and bars any purported exercise of police power. Many of the nation's airports are physically located entirely or partially within the boundaries of a governmental unit other than the entity which operates the airport. To allow police power regulation of aircraft noise by local entities with any jurisdictional tie to an airport would be to invite chaos in the national air transportation system.

III. Conflict

The Order issued by the FAA Chief of the Air Traffic Control Tower at Hollywood-Burbank stated that the preferential runway procedures outlined therein "are designed to reduce the community exposure to noise to the lowest practicable minimum" (A. 412). The court of appeals held that this "assertion represents a considered determination that measures of the magnitude of that taken by the City of Burbank are beneath 'the lowest practicable minimum'" and are thus in conflict with federal law (A. 426).

Since the United States recognizes that the FAA has authority to "reject" the imposition of a curfew (Br. 52 n.45), it is reduced to arguing that the FAA Order must mean something different from what it says, different from the interpretation placed on it by the FAA in its *amicus* briefs below, and different from what each of the lower courts found and held the Order to say and mean. Thus, the Government contends without supporting authority that the FAA Order "simply did not" represent any consideration and rejection of a locally imposed night curfew (Br. 51). This is a pure assumption which is refuted by the language and logic of the Order and by the demonstrated instances of FAA opposition to nighttime curfew restrictions over a period of two decades.

IV. Commerce Clause

The cursory treatment of the Commerce Clause issues in the brief for the United States fails to address at all our contention (and the district court's holding (A. 368, 406)) that the Burbank ordinance is invalid under the second test of *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945), because it purports to operate in an area where regulation should be prescribed by a single authority. The Department of Transportation has previously indicated, however, that it is in complete agreement with our position that air transportation requires regulation by a single authority and that the FAA's authority should not be compromised by permitting the enforcement of local laws or regulations regarding the use of the navigable airspace. *See* Appendix A to Answering Brief of the Port Authority of New York and New Jersey.

The Government's brief asserts without citation (Br. 56) that although an approach evaluating the nationwide effect of curfews "might be appropriate in some cases, we believe it is not correct in the present case." This statement ignores the settled course of decision in this Court that the local regulation should not be regarded as an isolated phenomenon but should be weighed and tested as if similar restrictions were adopted throughout the United States (*see* Appellees' Br. 72, 77). Evaluated on this basis, night curfews on aircraft operations would cause massive disruption in the national air transport system, constituting an unreasonable burden on interstate commerce (F.F. 61-84, A. 394-401).

ARGUMENT

I. FEDERAL AIRSPACE MANAGEMENT REQUIRES CONTROL OF THE HOURS DURING WHICH AIRCRAFT MAY ENTER THE NAVIGABLE AIRSPACE.

The brief for the United States recognizes that "airspace management" is an exclusively federal responsibility. Thus, the brief states:

> "Among the areas in which there appears to be a clear federal preemption of State regulation are the following: . . . airspace management, . . . committed to exclusive federal regulation through the Federal Aviation Administration (FAA)." (Br. 8.)

Again, the United States' brief asserts:

> "That there is a very substantial segment of air commerce, *including all aspects of airspace management*, flight navigation, and safety, from which the States are excluded from the exercise of any regulatory power by federal preemption is scarcely subject to dispute. . . ." (Br. 12; emphasis added.)

The position advanced by the United States cannot survive this concession. As we shall show, "airspace management" is a comprehensive concept which includes management of the hours during which aircraft can enter the navigable airspace at Hollywood-Burbank and comparable air carrier airports in the national air transportation system. Once it is recognized that airspace management is an exclusively federal responsibility, it is plain that there is no room for local governmental units such as the City of Burbank unilaterally to deny jet aircraft access to the navigable airspace for one-third of each day at an airport which serves more than one million passengers each year (F.F. 20, A. 381). Restrictions so crucial to the system must come, if at all, from a centralized authority

entrusted by Congress with all aspects of airspace management.*

A. Regulation of the Hours of Aircraft Operations Is a Critical Aspect of Federal Airspace Management.

If the federal government is to be an effective manager of the nation's navigable airspace, it seems inescapable that it must be able to utilize the airspace 24 hours a day without the handicap of severe and cumulatively debilitating restrictions imposed by local governments. This is demonstrated by the record in this case, by the positions taken by the responsible federal agencies, and by the clear purpose of Congress.

Congestion, with attendant threat to safety and efficiency, stands out as a major problem for the nation's air transportation system even under present circumstances where operations can be spread over 24 hours. At the trial, Benjamin Freiman, Chief of the Air Route Traffic Control Center for the Southern California area, described the air traffic situation in the Los Angeles Basin as being "quite congested," with "major congestion" occurring between 6:00 p.m. and 9:30 p.m. (A. 192). When the airspace is congested, Freiman testified, "we are making use of all available airspace at that particular time" (A. 193).

The Third Annual Report of the Secretary of Transportation to the President and Congress for Fiscal Year

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* We do not contend, as the United States implies (Br. 9, 56), that there must be "uniform national treatment" in which all airports would be "treated alike" as to night curfews. We recognize that different airports may require different treatment. We contend, however, that such decisions should be made by a national agency, able to assess nationwide information and the multiple national interests involved, rather than by local entities with "any jurisdictional tie," as urged by the United States (Br. 46).

1969, contains a graphic illustration of the congestion problem:

> "On one day in July, a total of 1,927 aircraft in the vicinity of New York City were delayed either in taking off or landing — some for as long as 3 hours. From this large east-coast hub, congestion spread to other points. Once aircraft stacked up over New York's airports, other New York-bound aircraft were forced to sit on the ground either at their points of origin or elsewhere, all the while using up ramps originally intended for incoming flights. Hence, stacks began to form at other airports. . . ." (p. 75.)

If there is to be a substantial limitation on the hours during which aircraft operations are permitted, there is bound to be an increase in the congestion during the remaining hours, especially during the hours immediately before the curfew when congestion is already at its worst. Under the Federal Aviation Act, a restriction on the air transportation system having such adverse consequences should be imposed, if at all, by a centralized authority able to take into account the multiple national interests involved.*

One of the clearest demonstrations of the need for centralized coordination of restrictions on the hours of aircraft operation is the experience with the FAA's "flow control" procedures. Flow control is a means of meter-

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* In this connection, the court of appeals correctly emphasized:

> "Pursuant to this statutory scheme, the Administrator of the FAA must balance considerations of safety, efficiency, technological progress, common defense and environmental protection in the process of formulating rules and regulations with respect to the use of the nation's airspace. . . . If State and local governments were to be allowed to exercise supplementary power in this area, they might conceivably be overprotective of one of the multiple values and upset the delicate balance struck by the FAA under the aegis of federal law." (A. 419.)

ing or restricting aircraft operations so as to cope with problems resulting from congestion, weather, equipment failure, or other impediments to air commerce. The flow control measures can involve restricting departures during a given period, or establishing separation of aircraft in time, altitude, or distance (F.F. 51, A. 390-91).

Initially, when the program was instituted in 1969, flow control decisions were made by each of the 21 Air Route Traffic Control Centers for its own area. However, in April 1970, the FAA established a Central Flow Control Facility in Washington, D.C., to correlate the information for the entire system and to coordinate the flow control decision making process (F.F. 52, A. 391). The Fourth Annual Report of the Secretary of Transportation for Fiscal Year 1970 describes the need for "centralized" control as follows:

> "CENTRALIZED FLOW CONTROL. One of the more persistent problems plaguing air traffic in recent years has been the tendency of isolated instances of congestion to disrupt the flow of aircraft throughout the entire ATC [Air Traffic Control] system. On April 27, 1970, FAA took a significant step in dealing with this problem by establishing as a permanent part of the ATC system the Central Flow Control Facility in Washington, D.C.
>
> "Prior to the establishment of this facility, the sole responsibility for flow control (*i.e.*, controlling the flow of traffic by restricting the number of aircraft moving from one ARTCC [Air Route Traffic Control Center] to another) in the contiguous United States rested with each of 21 such centers. The shortcoming of this procedure was that each center made flow-control decisions from the limited perspective of its own control area; no center had enough information to make a judgment based on the overall condition of the ATC system. . . ." (p. 71.)

The flow control experience shows that even temporary restrictions on aircraft operations, by holding aircraft on the ground or increasing separation between aircraft, have to be centrally coordinated if airspace management is to be effective. Just as none of the 21 centers "had enough information to make a judgment based upon the overall condition" of the system, it is even more apparent that no local governmental entity would have enough information to make a judgment as to the effect on this system resulting from a lasting restriction such as a curfew. This judgment can be made only by an entity with sufficient information concerning the system *and* with authority to make the adjustments necessary to keep the system operating efficiently.

Curfews are highly contagious, and thus, as the record shows, the Burbank curfew cannot be considered in isolation (F.F. 69, A. 396). The drastic effect of curfews on federal airspace management can be fully appreciated only in relation to flight scheduling across the six time zones into which the United States is divided:

— If an 11 p.m. to 7 a.m. curfew on jet takeoffs were in force at Burbank and at Portland, Continental Air Lines could originate flights northbound or southbound along its route from the Los Angeles area to Seattle (all within the same time zone) only between 7 a.m. and 7 p.m. (F.F. 67, A. 396). Standing alone, the Burbank curfew affects Seattle residents by limiting southbound departures on this route to the period from 7 a.m. to 7 p.m. (F.F. 66, A. 395).

— If an 11 p.m. to 7 a.m. curfew on jet takeoffs were in force over the entire route from Seattle to New Orleans, Continental Air Lines would be able to originate eastbound departures only between 7 a.m. and 2 p.m. (F.F. 68, A. 396).

—If a nationwide 11 p.m. to 7 a.m. curfew on jet takeoffs and landings were in force over the entire route covering six time zones, an air carrier could originate an east-bound flight from Honolulu to New York only between the hours of 7 a.m. and 9 a.m.

The drastic effect of curfews was described to subcommittees of the House Commerce Committee as early as December 4, 1962, by John R. Wiley, Director of Aviation, Port of New York Authority. Mr. Wiley gave a detailed description of the "progressive strangulation of air commerce between just one pair of cities, New York and London, if each were to impose a 10 p.m. to 7 a.m. curfew," and then summed up the broader consequences as follows:

"[I]f this practice should be extended to other airports throughout the world, east and west of New York and London, and in different time zones, I believe we can readily see that we would have a situation so chaotic as to make the airplane worthless as an instrument of world communication." *Hearings Before Subcomms. of the House Comm. on Interstate and Foreign Commerce,* 86th & 87th Cong. 528-30 (1963) [hereinafter cited "1959-1962 House Hearings on Aircraft Noise Problems"].

Opposition to nighttime restrictions as a "blockade on traffic flow" extending beyond the curfew period and affecting "all airports within the traffic flow" was expressed by the Airport Operators Council International (AOCI) in the 1971 House hearings in connection with the Noise Control Act:

"A single curfew at a major U.S. airport acts as a blockade on traffic flow not only within the time of the curfew, but also at other times for interstate and international aviation traffic operating in different time zones. This problem is especially damaging to night-

time traffic, often cargo traffic, which if thrown upon the daytime schedule would crowd already heavily burdened air traffic facilities. This in no way would be in the best interest of the traveling public nor to the nation's economy." *Hearings on H. R. 5275, et al., Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce,* 92d Cong., 2d Sess., Ser. No. 92-30, at 483 (1971).

The brief for the United States refers to curfews "already in existence" at Washington National, Morristown, New Jersey, London and "many major European cities," apparently attempting to show that states and localities have curfew authority and that centralized management is unnecessary (Br. 41-42). The examples, however, show the opposite. Washington National Airport, where the restriction is the result of a "voluntary agreement" of the carriers, is operated by the Federal Aviation Administration. *Virginians for Dulles v. Volpe,* 344 F. Supp. 573 (E.D. Va. 1972). As to the restriction on nighttime operations imposed at Morristown Airport by a state court, the United States has filed an action in the federal court in New Jersey to compel the dissolution of that restriction. *United States v. Town of Morristown,* Civil No. 1214-72, D.N.J. (filed July 17, 1972). The prayer in that action asks that the Town of Morristown, the Township of Hanover and other defendants be compelled to file a joint motion to modify the state court judgment to delete "the restrictions imposed against the landing and takeoffs of jet aircraft."

Moreover, contrary to the government's implication, the foreign precedents firmly support our position that curfews are a crucial aspect of airspace management which require centralized regulation at the national level. Our investigation has failed to disclose any country in which airport curfews are imposed other than by the

national government concerned or under its direct supervision.*

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* *See:* Australia: Air Navigation Act 1920-1971, §26(2)(e); and Air Navigation Regulations, Reg. 82(2). [Director-General of Civil Aviation may establish curfews pursuant to his statutory power to regulate "establishment, maintenance, operation, and use of aerodromes".]

Canada: Aeronautics Act, CAN. REV. STAT. 1970, ch. A-3, §6; and Air Regulations, SOR/61-10 (1960), *as amended* by SOR/69-627 (1969), §104. [Minister of Transport may establish curfews pursuant to his statutory power to control and regulate air navigation in Canada.]

France: C. AVIATION CIV. art. R221-3 (1968); and Ministry of Transport Decision, April 4, 1968 (pertaining to Orly Airport). [Secretariat of Civil Aviation may restrict airport use if restriction justified by reasons of public policy.] *See also* Ministry of the Interior Circular No. 70-463 (Oct. 17, 1970), stating that decisions purporting to forbid aircraft overflights of any area within France must be made at the ministerial level.

Germany: Luftverkehrgesetz (Air Navigation Act) [1968], BGB1. IS. 1113, §6. [Supervisory control over airports delegated to state ministries, but they act subject to approval of Federal Ministry of Transportation.]

Jamaica: Civil Aviation Act 1966, §§3(2)(s) and 10(1)(f). [Ministry of Communications and Works given general power to regulate the establishment and conditions of use of airports.]

Japan: Local airports have imposed curfews, but only pursuant to an Administrative Guidance, Ministry of Transportation (Mar. 29, 1972) and after recommendations of the Environmental Protection Department as required by Law No. 88, art. 6, para. 3 (1971).

Switzerland: Concession of the Operation of the Airport of Geneva-Cointrin (Nov. 20, 1951, *as amended* Mar. 23, 1972). [Airports are operated pursuant to federal charter; amendment of charter was considered necessary to permit imposition of curfews.]

United Kingdom: Civil Aviation Act of 1971 c. 75, §29; STAT. INSTR. 1971 No. 1686; STAT. INSTR. 1971 No. 1687; and U.K. Air Pilot, AGA 116C, (London-Heathrow) (Mar. 21, 1972). [Secretary of State given express power of regulating aerodrome operations to prevent noise; issues curfews and other restrictions via Notices to Airmen.]

The airports of Basel-Mulhouse (operated pursuant to a Franco-Swiss treaty of 4 July 1949) and Berlin (operated by the Allies) are considered special cases exempt from the statutory schemes outlined above.

The adverse effects of curfews on airspace management are summarized in the Findings of Fact.* Based upon testimony at the trial, the district court found that curfews would increase congestion, aggravate the noise problem, and cause a loss of efficiency:

> "The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during these hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities. Such a result is totally inconsistent with the objectives of the federal statutory and regulatory scheme." (F.F. 78, A. 399.)

> "The imposition of curfew ordinances on a nationwide basis would cause a serious loss of efficiency in the use of the navigable airspace. . . ." (F.F. 82, A. 400.)

It is utterly inconsistent for the United States, having recognized that airspace management is an exclusively federal domain, to argue that local authorities are free to exercise their police power to impose curfews. To insure safety and efficiency, federal airspace management must encompass decision-making power with respect to hours of operation at airports like Hollywood-Burbank.

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* The Findings in this case were based upon the district court's "Memorandum for Use in Preparation of Proposed Findings of Fact, Conclusions of Law, and Judgment" (R. 278). The Findings were settled by the court after a hearing on the objections of the defendants (appellants here) (R. 312, 330, 332, 340, 362, 367).

B. The FAA Has Long Regarded Local Curfews as Detrimental to Federal Airspace Management.

1. Congressional reliance on the FAA in noise abatement matters.

In noise abatement matters, Congress has consistently looked to the FAA in preference to other federal agencies. As pointed out in our principal brief (pp. 26-27), the Federal Aviation Act of 1958 vested plenary authority for airspace management in the Federal Aviation Administrator. The Administrator's authority was intended to include broad rulemaking power to regulate noise in the vicinity of airports, as we discuss at pp. 25-28, *infra*.

The specific question of the agency to be responsible for noise abatement matters arose in connection with the 1968 Amendment to the Act. At that time, the Administration proposed a bill (H.R. 3400) which would have empowered the Secretary of Transportation to prescribe aircraft noise abatement rules and regulations.[1] *Hearings on H.R. 3400, H.R. 14146 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st & 2nd Sess., Ser. No. 90-35, at 1 (1968). However, the bill reported out of committee placed this authority in the Administrator of the FAA. H.R. Rep. No. 1463, 90th Cong., 2nd Sess., at 1, 5 (1968) [hereinafter "H. R. Rep. No. 1463"]. Representative Pickle explained in the debates that the House committee had "revested the noise functions in the FAA . . . ." 114 Cong. Rec. 16387 (1968). And the legislation ultimately enacted fixed responsibility in the FAA. Pub. L. No. 90-411, 82 Stat. 395 (1968).

In 1972 when Congress amended the noise abatement provision of the Federal Aviation Act, it again rejected an attempt to place noise abatement authority in another agency. In the House, a floor amendment which

would have placed this authority in the Administrator of the Environmental Protection Agency (EPA) was rejected, and the bill which passed (H.R. 11021) on February 29, 1972 continued to place aircraft noise abatement authority in the Administrator of the FAA. 118 Cong. Rec. H 1525, 1532 (daily ed. Feb. 29, 1972). However, the bill passed by the Senate on October 13, 1972 would have placed noise abatement authority in the Administrator of EPA. S. 3342, §501(a), 118 Cong. Rec. S 18013 (daily ed. Oct. 13, 1972). When the Senate and House versions were blended together into the form in which the legislation was ultimately enacted, the final authority to prescribe and amend noise abatement regulations was retained by the FAA. Noise Control Act of 1972, Pub. L. No. 92-574, § 7, 86 Stat. 1239, *reprinted as* Appendix A to our principal brief.

Thus, twice within the last five years, Congress has deliberately reaffirmed its decision, initially taken in 1958, to place the Government's regulatory authority over noise in the FAA and not in some other agency.

2. Position of the FAA in the lower courts.

Because Congress has vested in the FAA ultimate authority for noise abatement regulations, the views of the FAA are of great weight. In the trial court, the United States Attorney for the Central District of California filed an *amicus curiae* brief on behalf of the FAA, contending that the FAA's authority over all aspects of airspace management leaves no room for local curfew ordinances:

"In enacting the Federal Aviation Act of 1958, Congress intended to establish the right of every citizen to freedom of transit through the navigable airspace of the United States and to facilitate the exercise of that right by a federal regulatory scheme which would

promote both the efficient use of navigable airspace and the efficiency of aircraft operations. In order to achieve this purpose, Congress vested the Administrator of the FAA with 'plenary' and 'unquestionable authority for all aspects of airspace management.' S. Rep. No. 1811, 85th Cong., 2d Sess. 14 (1958). In this connection, there is no question but that Congress intended that the Administrator deal with the problem of airspace congestion in the exercise of his broad authority over *all aspects of airspace management.* Id. at 13-17.... It is clear, however, that neither the efficient use of navigable airspace nor the efficiency of aircraft operations is served by local ordinances which would prohibit the use of navigable airspace for fully one-third of the hours available for such use. And it is equally obvious that local curfew ordinances necessarily aggravate the congestion problem by drastically reducing the hours available for scheduled services. Accordingly, such local legislation with objectives different than those which Congress has sought to achieve must yield." (pp. 10-11; emphasis added.)*

The FAA's position with respect to the ordinance is summed up in the conclusion to its brief, as follows:

"The Burbank jet aircraft curfew ordinance is invalid since it attempts to regulate in a field preempted by Congress. The ordinance places an intolerable burden on interstate and foreign commerce, by removing from use during an eight-hour period each day, an airport which is a vital part of the national airport system. A prolifieration of this type of local ordinance by non-proprietors of airports would stagnate and

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* Ten copies each of the briefs for the FAA filed in the trial court and the court of appeals have been lodged with the Clerk.

destroy the national air transportation system...." (pp. 15-16).*

In the Court of Appeals for the Ninth Circuit, the United States Attorney again filed an *amicus curiae* brief on behalf of the FAA. The FAA brief, which supported the trial court's opinion in all aspects, took the following position on the preemption question:

"The efficient use of navigable airspace and the efficiency of aircraft operations are clearly not served by local ordinances that would prohibit the use of airspace for large portions of each day — in Burbank's case fully one-third of the available hours. See Findings of Fact 70-77, 79-82. And equally obvious is the fact that local curfew ordinances necessarily aggravate congestion problems by reducing the hours available for scheduled services. See Finding of Fact 78. *Thus, the results produced by local regulation such as that in question are clearly inconsistent with the intention of Congress, as expressed by it and as construed by the agency charged with administration of the nation's airspace.* The efforts of the Administrator would come to naught and the will of Congress would be thwarted if every locality were to enact similar laws. See Findings of Fact 78, 82." (pp. 17-18; emphasis added.)

3. Opposition of FAA to curfews at other airports.

The opposition of the Administrator of the FAA to locally imposed curfews on commercial jet operations extends from the beginning of the commercial jet age

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* The Department of Transportation took a remarkably similar position in its "Opinion" filed in 1971 in the Supreme Judicial Court of Massachusetts, which is set forth as Exhibit A to the Answering Brief of the Port Authority of New York and New Jersey as *Amicus Curiae* filed in this case.

in 1959 up to the present time. The frequently voiced opposition by the FAA to locally imposed curfews totally refutes the claim of the Brief for the United States (p. 52) that any rejection by the FAA of night curfews as a noise abatement measure would have represented "a major change in federal policy." In instance after instance, the FAA has indicated opposition to curfews, and has placed reliance instead on preferential runway or other noise abatement procedures consistent with continued operation of the airport.

On October 28, 1959, the FAA announced that it had under consideration a Special Civil Air Regulation for Los Angeles which would have, among other things, restricted jet operations between 10:00 p.m. and 7:00 a.m. 24 Fed. Reg. 9020 (1959). However, when adopted in 1960, the Regulation omitted the proposed restriction because of the FAA's conclusion that such restrictions could "create critically serious problems to all air transportation patterns." 25 Fed. Reg. 1764-65 (1960). The FAA statement said:

> "The proposed restriction on the use of the airport by jet aircraft between the hours of 10 p.m. and 7 a.m. under certain surface wind conditions has also been reevaluated and this provision has been omitted from the rule. The practice of prohibiting the use of various airports during certain specific hours could create critically serious problems to all air transportation patterns. The network of airports throughout the United States and the constant availability of these airports are essential to the maintenance of a sound air transportation system. The continuing growth of public acceptance of aviation as a major force in passenger tranportation and the increasingly significant role of commercial aviation in the nation's economy are accomplishments which cannot be inhibited if the best interest of the public is to be served. It was concluded therefore

that the extent of relief from the noise problem which this provision might have achieved would not have compensated the degree of restriction it would have imposed on domestic and foreign Air Commerce."

When the question of a night curfew arose again in the Los Angeles area more than a decade later, the FAA indicated its continued opposition to curfews in a letter dated August 3, 1971 to the Executive Officer of the Los Angeles County Board of Supervisors, who had inquired regarding the feasibilty of restricting aircraft operations between 11:00 a.m. and 7:00 p.m. at five general aviation airports operated by Los Angeles County. The reply of FAA Regional Director, which is set forth as Appendix A to this Supplemental Brief, stated:

"... Noise abatement flight procedures and preferential runway use procedures have been applicable and used at Los Angeles International Airport for some years.... We believe that other restrictions, particularly the type described in your letter, would place an intolerable burden on air transportation and air commerce, and would be detrimental not only to the City of Los Angeles but to the County of Los Angeles.

"Under the circumstances, we would not look favorably on any restriction of aircraft operations such as being studied by the Los Angeles County Board of Supervisors...."

On February 2, 1971, the FAA took a similar position in a letter to the attorney for the San Diego Unified Port District in opposition to the proposed curfew at the San Diego International Airport. The letter of the FAA Regional Counsel, which is set forth in Appendix B to this Supplemental Brief, stated:

"Basically the FAA is opposed to any type of night curfew at airports which would have an effect on the

national air transportation system. In summary, our legal position has been that the Federal Government has preempted the authority to regulate the efficient use of the airspace and to regulate aircraft noise and, therefore, the imposing of a night curfew by others is invalid and unconstitutional. . . ."

On August 31, 1960 the FAA Administrator issued a Special Civil Air Regulation for New York International Airport with a primary objective of reducing noise. In announcing this regulation, the Administrator stated that the FAA was rejecting a suggestion "to prohibit the operation of jet aircraft during nighttime hours" as being "not compatible with the critical need in the New York area for air transportation services." 25 Fed. Reg. 8538 (1960).

Over eleven years later the invalidity of a curfew was again stressed in New York State in a letter dated February 22, 1972 from the FAA Eastern Regional Director to the Chairman of a New York State Assembly Committee regarding a bill to prohibit landings and takeoffs between 11:00 p.m. and 7:00 a.m. The letter, which is set forth in Appendix C, stated:

> "We view the proposal as attempting to control the operation of aircraft and use of the navigable airspace, functions which are the particular domain of the Federal Government . . . ."

Similarly, in a letter dated May 10, 1972 to the Director of the Houston Intercontinental Airport, the Southwest Regional Director of the FAA stated his feeling that "the curfew, if allowed to proliferate, will ultimately have a deleterious effect on the National Aviation System because of its 'ripple' effect," and he strongly recommended against its adoption at the Houston Airport (letter set forth as Appendix D to this Supplemental Brief).

The opposition of FAA officials to curfews reflects careful evaluation of their practical consequences. Attached as Appendix E to this Supplemental Brief is a memorandum dated March 10, 1972 by Herbert J. Guth, FAA Director of Aviation Economics, entitled "Economic Impact of Night Curfews at Airports," the crux of which is summed up in the first paragraph:

> "The airlines, the airport operators, and the public who use air transportation would be significantly affected by the imposition of night curfews at United States airports. Utilization would drop particularly in the larger long-haul aircraft. Capacity in high density markets would decrease and peaking at the major airports would be intensified. The result would be increased costs to the airlines, increased airport delays, and increased prices for the purchase of air transportation."

In sum, FAA has consistently found curfews on night operations at air carrier airports comparable to Hollywood-Burbank to be detrimental to effective airspace management and an invasion of a federally preempted area. If federal airspace management is to achieve the goals set for it by Congress, there can be no room for curfews imposed by local jurisdiction through the exercise of police power.

II. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED TO PREVENT LOCAL JURISDICTIONS FROM EXERCISING POLICE POWER IN MATTERS OF AIRSPACE MANAGEMENT, AIRCRAFT OPERATIONS AND AIRCRAFT NOISE.

The brief for the United States founders upon the fundamental misstatement of three key elements of the legislative history of the Federal Aviation Act:

— The Government asserts, as the cornerstone of its argument, that the regulation of aircraft noise was not the subject of any congressional enactment prior to 1968 (Br. 23-24). This pronouncement is wrong. The legislative history demonstrates conclusively that the FAA's broad authority to make regulations "for the protection of persons and property on the ground" was written into the 1958 Act as a direct result of congressional concern with the problem of aircraft noise in the vicinity of the nation's airports. 1959-1962 House Hearings on Aircraft Noise Problems 543-44.

— Under the 1958 Act, Congress intended to vest authority for all aspects of airspace management once and for all in the Administrator of the FAA. To permit a local entity with "any jurisdictional tie" to an airport to disallocate airspace by imposing a night curfew, as urged by the United States (Br. 46), would fractionalize the authority for airspace management in direct opposition to the congressional purpose.

— The brief for the United States incorrectly asserts that the legislative history "has not . . . focused upon the distinction between airport control in a proprietary capacity and airport control by means of the exercise of police power" (Br. 45). It was precisely this distinction that was accepted by the Senate Commerce Committee in 1968 as marking the limits of permissible local regulation. In reporting the 1968 noise abatement amendment, the Senate committee concurred in the representation of the Secretary of Transportation that "State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." S. Rep. No. 1353, 90th Cong., 2d Sess. 6 (1968). The Government has attempted to bury this representation by the Secretary and thereby to distort the limited reservation of power to the airport proprietor intended by Congress into a

license for any local entity having a jurisdictional tie to regulate aircraft operations by police power.

A. In the 1958 Act the FAA Administrator Was Granted Broad Rulemaking Authority To Deal With Aircraft Noise.

We demonstrated in our principal brief (pp. 28-29, 34-35) that the FAA has promulgated extensive noise abatement regulations under the 1958 Act's directive "to prescribe air traffic rules and regulations . . . for the protection of persons and property on the ground," 49 U.S.C. §1348(c). The Government asserts that this provision of the Act was included to provide protection "from insecticides sprayed from the air" and "was wholly unrelated to any congressional consideration of aircraft noise problems" (Br. 22-23). The legislative history demonstrates otherwise.

The Government bases its "insecticide" argument on the appearance of Congressman Preston before a House subcommittee on July 1, 1958. *Hearings on H.R. 12616 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce,* 85th Cong., 2d Sess. 267-69 (1958) [hereinafter "House Hearings on the 1958 Act"]. This member did in fact propose to add the words "for the protection of persons and property on the ground" to section 601(a)(6) of the existing law. *Id.* at 268; *compare id. with* Civil Aeronautics Act of 1938, §601(a)(6), 52 Stat. 1008. His amendment was offered to provide the Administrator with authority to control the dissemination of insecticides in crop dusting and with the author's recognition that "there would be other matters involved under this power . . ." House Hearings on the 1958 Act, at 268.

Congressman Preston's suggestion was not, however, the source of the Administrator's authority conferred by section 1348(c) of 49 U.S.C. to regulate "for the protec-

tion of persons and property on the ground." This language originated in Senate testimony given two weeks earlier by James T. Pyle, then Administrator of Civil Aeronautics. On June 17, 1958 Administrator Pyle recommended an amendment to section 601(a)(7)* of the existing law to "make it unmistakably clear that the Administrator has the authority to issue air traffic rules for the protection of persons and property on the ground as well as for the safe operation of aircraft." *Hearings on S. 3880 Before the Subcomm. on Aviation of the Senate Comm. on Interstate and Foreign Commerce,* 85th Cong., 2d Sess. 245-46 (1958); [hereinafter "Senate Hearings on the 1958 Act"]; *see id.* at 10. This recommendation was accepted by the committee: the amended provision was reported on July 9, 1958 as section 307(c) of S. 3880, 104 Cong. Rec. 13627 (1958), and was ultimately enacted as section 307(c) of the 1958 Act, 49 U.S.C. §1348(c). It provides:

> "The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, *for the protection of persons and property on the ground,* and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects." (Emphasis added.)

Unmistakable evidence that Congress intended, in adopting section 1348(c) of 49 U.S.C., to provide the Ad-

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* It was section 601(a)(7) which was the predecessor of 49 U.S.C. §1348(c), not section 601(a)(6) (the target of Congressman Preston's suggested amendment). *Compare* section 601(a)(6) and (7) of the Civil Aeronautics Act of 1938, 52 Stat. 1006, *with* 49 U.S.C. §1348(c).

ministrator with broad rulemaking authority to regulate noise in the vicinity of airports is found in the 1959-1962 House Hearings on Aircraft Noise Problems. On December 4, 1962 Chairman Oren Harris of the House Interstate and Foreign Commerce Committee discussed with Administrator Halaby the FAA's authority "to deal with this subject [of noise], particularly with reference to zoning and location of airports and all the things that are necessary in its operation." *Id.* at 543. Chairman Harris stated:

"I can refer you to the committee report of the 86th Congress, filed October 15, 1959. That was shortly after the Congress approved the new Federal Aviation Agency, of course, some time before you arrived on the scene and accepted your tremendous responsibility.

"We said in that report, and I am quoting page 7:

'For many years, the committee has been engaged in the study of aircraft noise problems which are considerable in the vicinity of some of the Nation's major airports. In writing the Federal Aviation Act of 1958, Congress expressly gave the new Federal Aviation Agency authority to make regulations "for the protection of persons and property on the ground," a broad extension of the rulemaking authority which had been granted to the Civil Aeronautics Board by the Civil Aeronautics Act of 1938.'

"Now, if I recall, during the course of that legislation, we had a colleague from Georgia, Mr. Prince Preston, who brought to the attention of this committee a problem with reference to the dusting of cotton.

"The committee considered that problem, and if I recall correctly, we decided not to limit this authority to crop dusting, and we reminded the Congress in that report that we did extend the broad rulemaking authority.

"...

"Now, I feel, Mr. Halaby, and you gentlemen of the airport operators' council, that the Congress did consider this matter and the authority when the FAA Act was passed in 1958, and I feel that there is legislative history that does give you the authority." *Id.* at 543-44.*

Chairman Harris was "a principal architect" of the Federal Aviation Act of 1958. *Id.* at 545. His elucidation that Congress adopted section 1348(c) of 49 U.S.C. to give the Administrator "broad rulemaking authority" over aircraft noise problems lays to rest the Government's insecticide claim.

The Government is also in error in representing as fact, without any supporting reference, that between 1958 and 1968 the authority conferred by 49 U.S.C. §1348(c) was exercised by the Administrator only to the extent of establishing preferential runway requirements at "a few selected noise-sensitive airports" (Br. 50). As early as 1962, noise abatement runway patterns were in use "in every major airport in the United States." Testimony of CAB Chairman Alan S. Boyd on December 4, 1962, 1959-1962 House Hearings on Aircraft Noise 507. And, of course, the record in this case demonstrates that such an FAA order was in effect at Hollywood-Burbank Airport (PX 30, A. 113, 453-62).

B. The Purpose of the 1958 Act Was To End Jurisdictional Divisions and Vest Plenary Authority Over Airspace Management and Aircraft Operations in the FAA Administrator.

The Federal Aviation Act of 1958 was designed to correct two fundamental deficiencies existing at the time

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* The report referred to by Chairman Harris is H.R. REP. No. 1192, 86th Cong., 1st Sess. (1959).

of enactment with respect to the Government's responsibility for aviation matters. These shortcomings were identified by the Senate Commerce Committee Report as (1) the "diffusion of authority for the general regulation of civil aeronautics" and (2) the "lack of clear statutory authority for centralized airspace management." S. Rep. No. 1811, 85th Cong., 2d Sess. 10 (1958) [hereinafter "S. Rep. No. 1811"]. The report notes that the question of airspace management had been "hardly conceived" when our basic aviation statutes, the Civil Aeronautics Act of 1938, and the Air Commerce Act of 1926, were enacted. *Id.* at 13. The years between 1938 and 1958 had witnessed a quadrupling of air traffic, the introduction of larger and faster aircraft which required more airspace to maintain separation, and increased military air operations. By 1958 the nation's airspace had become overcrowded and was described in the Senate Report as "a diminishing resource." *Id.* at 13-14.

Prior to adoption of the 1958 Act, responsibility for the allocation of airspace was divided among the Civil Aeronautics Board, the Civil Aeronautics Agency, the President and the Secretary of Defense. This situation was characterized in hearings on the 1958 Act by General Quesada, then Chairman of the Airways Modernization Board and later the first FAA Administrator, as follows:

> "In this hodgepodge of authorities, the committee method has been used to assign airspace on a case-by-case basis resulting in long debate, serious delay, and patchwork solutions. This method has contributed to congested conditions in large sectors of the country, forcing serious inflexibilities on both civil and defense operations." House Hearings on the 1958 Act, at 30.

This "splintering of airspace management" was one of the evils the 1958 Act was designed to eliminate. S. Rep. No. 1811, at 15. This was accomplished, in the words

of the Senate Report, "by vesting unquestionable authority for all aspects of airspace management in the Administrator of the new [Federal Aviation] Agency." *Id.* at 14. Thus Congress provided in section 1348 (a) of 49 U.S.C. as follows:

> "The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace...."

Having vested this "plenary" authority in the Administrator, Congress was careful to guard against any future "fractionalization" of his authority by providing in section 1341(a) of 49 U.S.C. that:

> "In the exercise of his duties and the discharge of his responsibilities under this chapter, the Administrator shall not submit his decisions for the approval of, nor be bound by the decisions or recommendations of, any committee, board, or other organization created by Executive order." S. Rep. No. 1811, at 15.

Congress also recognized in adopting the 1958 Act that "effective airspace management and planning is not a matter involving airborne craft alone." S. Rep. No. 1811, at 16. Airspace requirements generated by airport and runway locations also demanded centralized regulation and control. Congress provided the Administrator the means to assure conformity to his plans and policies for, and allocations of, airspace in sections 1349 and 1350 of 49 U.S.C. Section 1349 provides in substance that no federal funds shall be expended for the construction or substantial alteration of civil or military airports until the location, plans and layouts thereof have been approved by the Administrator. Similarly, section 1350

prohibits the establishment or construction of civil airports not receiving federal funds, or even the substantial alteration of a runway layout, without prior compliance with regulations prescribed by the Administrator. *See also* 49 U.S.C. §1353(a).

For its contention that the 1958 Act "was not understood" to have divested states and their instrumentalities of authority to impose airport curfews (Br. 24-25), the Government relies on the 1962 statements of the then Deputy General Counsel of the FAA, James Hill. 1959-1962 House Hearings on Aircraft Noise Problems, at 670, 699. Mr. Hill made his remarks as a panelist during a discussion of "existing legal rights of the private citizen who is aggrieved by aircraft noise" (*id.* at 642).

The Government's reliance on Mr. Hill is misplaced for several reasons. His statements do not cast light upon the intention of Congress; rather they are, in his own words, "off-the-cuff" expressions of a lawyer's opinion (*id.* at 659, 672). Mr. Hill first stated that "whether jets land at all or not at an airport or whether they take off at night or not is up to the municipality" that "owns the airport" (*id.* at 670). Then he acquiesced in the statement that the FAA was "not sure whether or not airport operators can bar jets" (*id.* at 672-73). During the discussion several instances of Mr. Hill's confusion concerning the scope of FAA authority and responsibility were clarified by other panelists (*e.g.*, *id.* at 670; *compare id.* at 675 *with id.* at 676-77).

The panel discussion centered around the Court's recent decision in *Griggs v. Allegheny County*, 369 U.S. 84 (1962), and Mr. Hill was clearly anxious to admit of no federal authority that would change the result in that case. 1959-1962 House Hearings on Aircraft Noise Problems, at 671; *see also id.* at 697. But at no time did Mr. Hill suggest that state and local governments could reg-

ulate aircraft noise through an exercise of police power. Rather he consistently referred to requirements of the "community that owns the airport" or the "municipality that built the airport" (*id.* at 670, 671).

In sum, the regulation of air traffic flow from the surface of an airport into the navigable airspace constitutes a crucial aspect of the airspace management responsibility vested in the FAA by the 1958 Act. Any governmental entity which regulates the hours that this air traffic may flow from the surface of an airport is engaged in airspace management. The Department of Transportation has overruled the position taken by the FAA in each of the lower courts and now urges the Court to hold that State and local governments with any jurisdictional tie to an airport be allowed to exercise their police power to regulate by curfew the hours of airport operation. Such a holding would be antithetical to the result sought by the 1958 Act because it would allow local entities to disallocate airspace and thereby fractionalize the authority vested in the Administrator of the FAA.

C. The 1968 Amendment Banned Any Exercise of Police Power by Local Jurisdictions.

During the Senate hearing on the 1968 noise abatement amendment, the Secretary of Transportation was asked by Commerce Committee Chairman Monroney whether State and local governments could "go beyond" the minimum noise emission standards to be set by the FAA Administrator under section 611, 49 U.S.C. §1431. Secretary Boyd replied:

> "I do not think the State could. I would like to have the opportunity to submit an opinion for the record.
>
> "I would think that any authority would be related to the airport itself, Mr. Chairman, but we would like to submit a written opinion on that." *Hearing on S.*

707 and H.R. 3400 Before the Aviation Subcomm. of the Senate Comm. on Commerce, 90th Cong., 2d Sess., Ser. No. 90-72, at 29 (1968).

The letter submitted by the Secretary of Transportation in further response to Chairman Monroney's question is printed in the hearing (*id.* at 61) and quoted extensively in the Senate Report. The report declares that the Senate Committee concurs in the Secretary of Transportation's representation that "State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." S. Rep. No. 1353, 90th Cong., 2d Sess. 6 (1968) [hereinafter "S. Rep. No. 1353"]. The Senate Report also expressly concurred in the following statement by the Secretary of Transportation concerning the limited powers of "airport owners acting as proprietors":

> "However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." *Id.*

The Secretary's letter also indicated that the 1968 amendment would "expand the Federal Government's role in a field already preempted" (*id.*), citing as authority the district court opinion in *American Airlines, Inc. v. Town of Hempstead,* 272 F. Supp. 226 (E.D.N.Y. 1967). The district court held that an attempt to regulate aircraft noise by local police power was unconstitutional on both preemption and conflict grounds. The Government purports to find unexplained significance in the chronology of the Secretary's letter having been written to the

Senate committee approximately three weeks before the court of appeals affirmed *Hempstead* on the conflict ground without reaching the preemption issue (Br. 47 n. 38). The chronology demonstrates, however, that the 1968 amendment was passed by both houses of Congress prior to the Second Circuit's affirmance of the district court opinion. 114 Cong. Rec. 16399, 20931 (1968). And it was the preemption aspect of the district court's opinion that was expressly concurred in by the Senate Report. S. Rep. No. 1353, at 6.

In the face of this clear legislative history, there is no merit to the suggestion of the brief filed by the United States and expressing the views of the Department of Transportation that, in adopting the 1968 amendment, Congress had not "focused" on the distinction between requirements established in a proprietary capacity and regulations imposed by the exercise of police power (Br. 45). Indeed, the distinction is the very one which the Secretary of Transportation drew in his letter to the Senate committee and which the committee then adopted.

The Government also errs seriously when it attempts to argue that this distinction, advanced by the Secretary of Transportation and concurred in by the Congress, is not valid (Br. 36 n.27, 44-48). This constitutes a blatant attempt to rewrite legislative history and thereby to thwart the explicit intention of Congress. In any event, the Government's challenge to the wisdom of Congress is not persuasive.

The Government purports to demonstrate that the distinction would lead to the "logically bizarre result" of a federal preemption policy that applies only to private airports (Br. 45-46). This is based on the assumption that Congress intended to preempt police power regulation only in the rare situation where the airport is not owned by a local governmental entity. Viewed correctly, however, the federal preemption intended by Congress applies

nationwide to all airports without regard to ownership and precludes resort to any local police power regulation. It was not the public or private character of the airport's ownership that Congress found determinative of federal preemption, but rather whether the regulation sought to be imposed was issued in a police or proprietary capacity. Accordingly, the preemption recognized by the Senate Report bars the purported application of police power to any airport, irrespective of the character of its ownership, but would permit certain kinds of regulation in a proprietary capacity by both publicly and privately owned airports.

In making this distinction, Congress did not act thoughtlessly or irresponsibly. As succinctly stated at page 7 of the Answering Brief of the Port Authority of New York and New Jersey as *Amicus Curiae*, Congress intended to do no more than to preserve an ancient "common-law right which inheres to the owner and operator of land." For Congress to seek to preserve an incident of property ownership, whatever it may prove to be,* from the broad sweep of federal preemption is reasonable. What is unreasonable is to contend that this preservation of a landlord's right necessarily implies a congressional intention to permit the States and each of the multiple subdivisions surrounding most airports to exercise their police power over these airports.

The Answering Brief of the Port Authority of New York and New Jersey as *Amicus Curiae* illustrates at pages 2-3 a number of situations where "local governments own and operate airports which are physically

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* The scope of airport proprietors' rights as such has not been judicially defined. Any resolution of such rights would involve the application of difficult constitutional, statutory and contractual principles to a factual record which is not before the Court in this case.

located in whole or in part within the boundaries of other units of government." Other illustrations of this condition were depicted at trial by the former head of the Civil Aeronautics Administration (A. 292-93). And during the 1959-1962 House Hearings on Aircraft Noise Problems, FAA Administrator Halaby recounted additional examples:

> "For example, in Cincinnati the principal airport is in another State, not even the same city or county. That is true in Friendship. It is outside the city of Baltimore. The San Francisco Airport is not in the County of San Francisco...." (*Id.* at 532.)

Indeed, this situation exists at Hollywood-Burbank Airport where over 2,000 feet of one runway lie within the City of Los Angeles (F.F. 12, A. 346).

In light of the potential for interference which thus exists at many of our nation's airports, Congress doubtless recognized that to allow police power regulation of aircraft noise by local entities with "any jurisdictional tie" to an airport, as here urged by the Government (Br. 46), would be to invite chaos in the national air transportation system.

D. The 1972 Act Did Not Alter the Proprietary-Police Power Distinction.

The legislative history of the Noise Control Act of 1972 is discussed at pages 40-47 of our principal brief. This history demonstrates that the Act was designed not to change the law with respect to federal preemption of aircraft noise regulation. The House Report states:

> "No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local governments that existed with respect to matters covered by

section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill." H.R. REP. No. 92-842, 92d Cong., 2d Sess. 10 (1972).

An identical statement is contained in the Senate Report. S. REP. No. 92-1160, 92d Cong., 2d Sess. 10-11 (1972).

Thus Congress' 1968 declaration — that local attempts to regulate aircraft noise through police power were federally preempted — was left undisturbed by the 1972 Act. The Government purports to find support for Burbank's curfew ordinance in the recollection of Representative Collier (Br. 42-43 & n.34). However, Mr. Collier was addressing himself only to requirements imposed in a proprietary capacity by "the local airport authority." 118 Cong. Rec. H 1535-36 (daily ed. Feb. 29, 1972). Representative Collier's remarks provide no support for an attempted police power regulation by a non-airport proprietor.

In its brief, which reportedly reflects the views of the Department of Transportation, the Government argues that Burbank's ordinance is not federally preempted because Congress has not legislated "comprehensively" on the subject of aircraft noise (Br. 38-39). This newly discovered position of the Department of Transportation is directly contrary to the views expressed by the Department in connection with the 1972 Act. The Department's response to the draft environmental impact statement (unpublished) prepared in connection with this legislation is set forth in the House Report. The Department's letter suggested that one of the paragraphs in the draft statement should be revised to place more emphasis on federal dominance of the field of aircraft noise regulation:

"Par. 3: This paragraph is inconsistent. The Federal Government has assumed the dominant role for noise (*preempted for aircraft*) in three areas:

"(a) P.L. 90-411: Standards for measurement and evaluation, and for control of aircraft noise and sonic boom.

"..." H.R. REP. No. 92-842, 92d Cong., 2d Sess. 36 (1972) (emphasis added).

The Government's brief, when compared with these comments on the 1972 Act and the Opinion of the Department of Transportation filed in the Massachusetts case in 1971, demonstrates that the Secretary of Transportation has an ever-changing view of the scope of federal preemption with respect to aircraft noise regulation. It is not, however, the vacillating view of the Secretary that is determinative of federal preemption, but rather the intent of Congress. Congress accepted the representation of the Secretary of Transportation in 1968 that local police power regulation in the area of aircraft noise was federally preempted. This view of the law was left unchanged by the 1972 Act. The intent of Congress is at odds with the latest edition of the Secretary's view of the law, and the position now urged by the Government must, accordingly, be rejected.

III. THE CONFLICT BETWEEN THE BURBANK ORDINANCE AND FEDERAL LAW IS NOT DIMINISHED BY THE UNITED STATES' BRIEF.

The Order issued by the FAA Chief of the Air Traffic Control Tower at Hollywood-Burbank stated that the preferential runway procedures outlined therein "are designed to reduce the community exposure to noise to the lowest practicable minimum" (A. 412). The court of appeals held that this "assertion represents a considered determination ... that measures of the magnitude of that taken by the City of Burbank are beneath 'the lowest practicable minimum'" and are thus in conflict with federal law (A. 426).

Since the United States recognizes that the FAA has authority to "reject" the imposition of a curfew (Br. 52 n.45), the United States is reduced to arguing that the FAA Order means something different from what it says, different from the interpretation placed on it by the FAA in its briefs in the lower courts, and different from what the trial court and the court of appeals found and held it to say and mean.* Thus, the brief for the United States asserts that the "lowest practicable minimum" language of the FAA Order "simply did not represent any consideration and rejection of the possibility of a locally imposed curfew on night operations" (Br. 51). Understandably enough, the brief for the United States offers no citation to support its "simply did not" statement. It is a pure assumption which is belied by the record and by the FAA's long-standing opposition to curfews.

The district court, having heard the testimony of FAA Tower Chief Lemmer and other witnesses regarding the Order, found that FAA had taken "in hand" the subject of nighttime takeoffs:

> "In issuing this order, said FAA Chief took in hand the subject matter of nighttime takeoffs, and, based upon his authority and expertise, acted to minimize the noise consequences of such operations." (F.F. 56, A. 393.)

It is significant that the *amicus* brief for the FAA in the courts below construed the Order just as did the court of appeals, and contrary to the position now urged by the brief for the United States. In the district court, the FAA

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* As part of its effort to diminish the conflict, the United States also asserts that between 1958 and 1968 the FAA exercised its noise abatement authority only "at a few selected noise-sensitive airports" (Br. 50). This is in error, for, as CAB Chairman Boyd pointed out, noise abatement procedures had been developed by the FAA "in every major airport in the United States" as early as 1962. See p. 28, *supra*.

brief attached a copy of the Order and described it as establishing "noise abatement procedures which are designed to reduce the community noise exposure to the lowest practicable minimum" (Br. 6). The FAA brief in the court of appeals takes the same position (Br. 9).

The experience a few years earlier at Los Angeles International Airport, summarized at page 20-21, *supra*, is inconsistent with the assumption made in the United States' brief that the Order at Burbank did not represent "any consideration" of a curfew. At Los Angeles the FAA explicitly considered a nighttime restriction on jet operations at International Airport but omitted it from the regulation finally adopted because such restrictions "could create critically serious problems to all air transportation patterns." 25 Fed. Reg. 1765 (1960).

Attempting to support its strained construction for the FAA's Burbank Order, the brief for the United States goes on to say (Br. 52) that rejection by the FAA of a night curfew at Burbank "would have represented a major change in federal policy." Again, this statement is unsupported. In fact, opposition to curfews has been a frequently stated and long-standing tenet of the FAA, as shown at pages 17-23, *supra*.

Curfews have been known, debated — and opposed — within the FAA for at least two decades. It strains credibility to contend that the experienced FAA Chief at Hollywood-Burbank Airport issued his Order regarding nighttime operations without "any consideration" of a curfew. Yet that is the unsupported basis of the United States' attempt to avoid the force of the FAA's Burbank Order.*

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* The two district court cases involving the Port Authority of New York, cited by the United States (Br. 50-52), do not show that the Burbank ordinance is compatible with the FAA Order. Both cases involved the exercise of proprietary, not police, power and therefore are altogether inapposite for the reasons

(Footnote continued on next page.)

IV. THE COMMERCE CLAUSE CONTINUES TO STAND AS A BARRIER TO THE BURBANK ORDINANCE.

The cursory treatment of the Commerce Clause issues in the brief for the United States is deficient and puzzling in many respects. The following points demonstrate the weakness of the Government's position:

A. The United States' brief does not address at all our contention (and the district court's holding (A. 368, 406)) that the Burbank ordinance is invalid under the second test of the *Southern Pacific* case because it purports to operate in an area where regulation should be prescribed by a single authority. This test and the correctness of district court's holding are discussed at pages 72-76 of our principal brief. In similar circumstances the Department of Transportation has evidenced complete agreement that air commerce requires regulation by a single authority. In its 1971 "Opinion" filed in the Supreme Judicial Court of Massachusetts, the Department stated:

> "Air transportation, perhaps more than any form of commerce, requires regulation by a single authority. Even before 600-mile per hour flights became the custom, Congress recognized this need by the establishment of the Federal Aviation Agency. It would indeed be a harmful and regressive step to permit a compromise of the FAA's authority through permitting the enforcement of local laws or regulations regarding

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stated in the preceding section. Morever, in Port of New York Authority v. Eastern Air Lines, Inc., 259 F. Supp. 745, 750 (E.D.N.Y. 1966), the FAA had written the Authority indicating its acquiescence in the restriction involved, which is to be contrasted with the FAA's opposition in the courts below to the Burbank ordinance. And in Aircraft Owners & Pilots Association v. Port Authority of New York, 305 F. Supp. 93, 99-100 (E.D.N.Y. 1969), the court stressed that the Authority's fee structure had been tacitly approved in the FAA "high density airports" rule.

the use of navigable airspace." *Reprinted in* Answering Brief of the Port Authority of New York and New Jersey as *Amicus Curiae* 12a-13a.

B. Without citation, the Government's brief (p. 56) asserts that although an approach evaluating the nationwide effect of curfews "might be appropriate in some cases, we believe it is not correct in the present case." This statement ignores the settled course of decision in this Court that the local regulation should not be regarded as an isolated phenomenon but should be weighed and tested as if similar regulations were enacted throughout the United States (*see* Appellees' Br. 72, 77).* Indeed, the Department of Transportation's opinion in the Massachusetts case acknowledges that the effect of nationwide application of a local restriction should be considered in matters involving the national air transportation system:

> "Such regulation cannot be considered solely 'in the accident of its particular circumstances.' *American Airlines, Inc. v. Town of Hempstead,* 272 F. Supp. 226, 231-232 (E.D. N.Y. 1967), for, if upheld, it would likely spread to other major airports and the inevitable result would be to hobble the supersonic aircraft as an instrument of national and world transportation." *Reprinted in* Answering Brief of the Port Authority of New York and New Jersey as *Amicus Curiae* 12a.

Evaluated on a nationwide basis, night curfews on aircraft operations would cause massive disruption of the

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* Perhaps revealing some doubt about considering only the specific impact of one curfew, the United States has added a footnote saying that "in considering the specific impact of a curfew ordinance, it would be appropriate to consider it in relation to other existing curfews" (Br. 56 n.49). Under this approach, the first curfew or the first few curfews might be valid, but not those subsequently enacted. Constitutionality should not depend upon which city acts first.

air transport system, constituting an unreasonable burden on interstate commerce (F.F. 61-84; A. 394-401).

C. It is a straw man for the United States to say "we do not believe that maintenance of an effective national air transportation system requires prohibiting a curfew at every airport" and "we do not think that all airports need be treated alike" (Br. 56). Appellees do not contend that all airports must be treated alike as to night curfews, but rather that such decisions must be made by a national agency. Moreover, the findings detailing the "near catastrophic effect" of a Burbank-type curfew were based upon nationwide imposition, not at all airports, but only at airports comparable to Hollywood-Burbank which have scheduled interstate air carrier operations (A. 396). The district court did not hold that all airports were to be treated alike, but rather that airspace management was a phase of the national commerce requiring regulation by a single authority (A. 373).

D. The United States' objection that the commerce argument is "predicted upon speculation about ordinances or rules not yet in existence" (Br. 56 n.48) ignores the uncontradicted evidence and findings that curfews, if upheld here, are "contagious" and "would be adopted by virtually all cities surrounding airports" (F.F. 69, A. 396). It also ignores current reports that many cities are considering curfews and awaiting the results of this litigation. *See* N.Y. Times, Dec. 7, 1972, at 39, Col. 1.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

WARREN CHRISTOPHER
RALPH W. DAU
MICHAEL D. ZIMMERMAN

Attorneys for Appellees

Of Counsel:

O'MELVENY & MYERS
KIRTLAND & PACKARD

February 1973.

Appendix A

Department of Transportation
Federal Aviation Administration
Western Region
Los Angeles, California
3 Aug. 1971

Mr. James S. Mize
Executive Officer
Board of Supervisors
County of Los Angeles
383 Hall of Administration
Los Angeles, California 90012

Dear Mr. Mize:

This is in response to your letter of 23 July 1971 reporting that the Los Angeles County Board of Supervisors has requested a report as to the feasibility of restricting aircraft operations at the airports operated by Los Angeles County between the hours of 11:00 p.m. and 7:00 a.m. Your letter also states that similar restrictions are needed at Los Angeles International Airport and requests our favorable consideration for such restrictions.

Los Angeles County presently operates five general aviation reliever type airports of which four (Compton Municipal, El Monte, Wm. J. Fox Airfield, and Brackett Field) have been developed, in part, by Federal funds totaling over $5 million. All the airports operated by the County are included in the National Airport Systems Plan and each accommodates fixed base operators, flying schools, and air taxi operators. There are slightly over 1,000 aircraft based at the five airports. The Federal Aviation Administration operates airport traffic service at El Monte and Brackett Field. The latter airport has an

airport traffic control tower constructed with Federal funds by the Federal Aviation Administration at a cost of $416,000 and ranked 76th out of 336 in the United States for total aircraft operations in 1970.

We recognize the right of the airport proprietor to regulate the use of the airport so long as that regulation is reasonable and nondiscriminatory. In accordance with the requirements in regard to the airports for which Federal funds have been expanded, Los Angeles County has agreed in its grant agreements with the Federal Aviation Administration to keep the airports open to all types, kinds, and classes of aeronautical use, and promised not to prohibit or limit such use unless necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public. Your letter does not present any information or evidence to support a determination that closure of all County operated airports between the hours of 11:00 p.m. and 7:00 a.m. is necessary from a safety standpoint or required by the civil aviation needs of the public. In fact, to discontinue use of these airports for one third of the time would obviously be a substantial loss to aviation and the public interest.

As you probably know, the legality of airport curfew laws is involved in *Lockheed Air Terminal, Inc. et al* v. *City of Burbank*, 318 F. Supp. 914 (C.D. Cal. 1970), presently on appeal to the Ninth Circuit United States Court of Appeals from the judgment of the United States District Court for the Central District of California. In essence the District Court concluded that air transportation "is a uniquely national operation in which the Federal interest is so dominant as to preclude the enforcement of state or local laws such as the Burbank Curfew Ordinance, on the same subject." The District Court held that the Burbank Curfew Ordinance was in conflict with the Federal statutes and regulations, that it constituted an invalid attempt to regulate national commerce, and

that enforcement of the ordinance would result in an intolerable and unreasonable burden on interstate commerce. In reaching this conclusion, Judge Crary carefully considered a previous California case entitled *Stagg* v. *Municipal Court,* 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969) and found that it was distinguishable and unpersuasive. That case involved an ordinance passed by the City of Santa Monica which restricted jet aircraft takeoffs from the Santa Monica Municipal Airport between the hours of 11:00 p.m. and 7:00 a.m. The Federal Aviation Administration believes that the decision of the United States District Court in *Lockheed Air Terminal* v. *City of Burbank* is correct and we have filed an Amicus Curiae brief in support of that decision in the Ninth Circuit.

In regard to Los Angeles International Airport which is owned and operated by the City of Los Angeles, we have received no information that would indicate that Los Angeles intends to adopt a curfew ordinance or that one is necessary. Noise abatement flight procedures and preferential runway use procedures have been applicable and used at Los Angeles International Airport for some years. In order to acquaint you with these procedures, I am taking the liberty of enclosing a copy of the affidavit by Mr. Donald J. Haugen, Chief, Los Angeles Tower — Terminal Radar Control, which contains detailed information concerning those procedures currently in effect. We believe that other restrictions, particularly the type described in your letter, would place an intolerable burden on air transportation and air commerce, and would be detrimental not only to the City of Los Angeles but to the County of Los Angeles.

Under the circumstances, we would not look favorably on any restriction of aircraft operations such as being studied by the Los Angeles County Board of Super-

visors. We will be glad to discuss this matter with the Board at any time or provide them with additional information as needed.

Sincerely,

/s/ Arvin O. Basnight

ARVIN O. BASNIGHT
Director

Appendix B

Department of Transportation
Federal Aviation Administration
Western Region
Los Angeles, California
2 February 1972

Mr. Joseph D. Patello
Port Attorney
San Diego Unified Port District
3165 Pacific Highway
San Diego, California 92112

Dear Joe:

Thank you for your letter of 23 December 1971 advising me of the discussions and pressures to impose a night curfew on airport operations or to close the passenger terminal building at Lindbergh Field, San Diego, California, International Airport from midnight to 6:00 A.M. As you point out, a number of the facilities at Lindbergh Field have been constructed with Federal financial assistance presently totaling about two million dollars, including $104,000 to remodel the old terminal building. Present requests for additional aid by the San Diego Unified Port District, filed under the Federal Airport and Airways Development Act, amount to about 1.6 million dollars. In the prior executed agreements for Federal aid the Port has assured the Federal Government that the airport will remain open to all types, kinds, and classes of aeronautical use except under certain specified conditions. The term "airport" is defined in both the Federal Airport Act and the Federal Airport and Airways Development Act to include airport buildings.

Basically the FAA is opposed to any type of night curfew at airports which would have an effect on the national air transportation system. In summary, our legal position has been that the Federal Government has preempted the authority to regulate the efficient use of the

airspace and to regulate aircraft noise and, therefore, the imposing of a night curfew by others is invalid and unconstitutional. This position has been clearly set forth in the amicus curiae briefs filed in the *Lockheed Air Terminal, Inc.* v. *City of Burbank* case in the United States District Court and the United States Court of Appeals, copies of which I am enclosing.

Contrary to popular belief there is no curfew at Washington National Airport. The FAA does have a voluntary agreement with the scheduled air carriers and other users to limit turbojet operations, but it should be borne in mind that Dulles International Airport and Baltimore International Airport are available without limitation to service the same metropolitan area, a situation which does not exist at San Diego. Furthermore, the Administrator in taking such action in regard to Washington National Airport is not only exercising his authority as a proprietor but is doing so only as he deems necessary to insure the efficient utilization of the airspace and to protect the public from unnecessary aircraft noise.

I have deliberately delayed answering your letter awaiting the 9th Circuit Decision in *Burbank* which is expected momentarily inasmuch as the case was submitted in early November 1971. In addition, I would assume that there would be no rush to take any action of the type contemplated which might affect air transportation services during the Republican National Convention in August.

Please advise me in regard to any developments and thank you once again for your letter.

Sincerely,

Original signed by
Ned K. Zartman

NED K. ZARTMAN
Regional Counsel

Appendix C

Department of Transportation
Federal Aviation Administration
Eastern Region
New York, N. Y.
22 Feb. 1972

Chairman, Committee on Industry and Economic Development
New York State Assembly
New York State Capitol
Albany, New York 12224

Dear Mr. Chairman:

There has come to our attention your Bill No. 8839, proposing to amend the General Business Law to prohibit takeoff and landing of aircraft at airports between 11:00 p.m. and 7:00 a.m.

We view the proposal as attempting to control the operation of aircraft and use of the navigable airspace, functions which are the particular domain of the Federal Government [*American Airlines* v. *Town of Hempstead*, Affd. 398 F 2d 369 (CA-2) Cert denied 393 US 1017]. For reasons set forth in the cited case, we consider the proposed legislation to be unconstitutional.

Should you desire further elaboration of our views, you may wish to contact our Regional Counsel, Area Code 212, 995-2815.

Sincerely,

Original signed by:
Robert H. Stanton

GEORGE M. GARY
Director

Appendix D

Department of Transportation
Federal Aviation Administration
Southwestern Region
10 May 1972

Mr. Joseph A. Foster, Director
Department of Aviation
City of Houston
Houston Intercontinental Airport
2800 Terminal Road
Houston, Texas 77060

Dear Mr. Foster:

Your letter of 28 April 1972 requested our advice concerning proposed restrictions on scheduled commercial air carrier operations at William P. Hobby Airport, Houston, Texas.

As you know, §308(a) of the Federal Aviation Act of 1958, as amended [49 U.S.C. §1349(a)] provides that there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended. Additionally, each of the various Federal Airport Aid Projects (FAAP) which have been completed under the Federal Aid for Public Airport Development Program [69 U.S.C. §1101, et seq.] for the William P. Hobby Airport contain assurances from the City of Houston to the effect that the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination. In this connection, our records indicate that the City of Houston has received some $4,799,032 of FAAP funds for various projects in connection with the Hobby Airport.

For the sake of convenience, the following are our comments in the same order as your proposed restrictions.

1. Restriction of Hobby Airport to scheduled commercial air carrier operations using aircraft having *not more than two jet engines* would, in our opinion, be discriminatory against Braniff Airlines for the reason that Braniff would be utilizing either Boeing 720's (which have four jet engines) or Boeing 727's (which have three jet engines). In this connection, it is apparent that the proposed restriction would have no effect on the current operations of Southwest Airlines which is operating Boeing 737's (which have two jet engines). For the foregoing reason, we would strongly recommend that the City of Houston not adopt this proposed restriction.

2. Restrict scheduled commercial air carrier operations to flights having "first landing" destinations of *not more than 300 nautical miles* from the Hobby Airport. Since this restriction would apply equally to all scheduled air carriers, we feel that it would be *the least objectionable* of all the proposed restrictions; however, we would be remiss if we failed to point out this type of restriction could become discriminatory in a very short time owing to rapid changes in the field of air transportation. This being so, while we would interpose no objection to the restriction at this time, the situation could change and require us to change our views at a later date. In this connection, it is my understanding that the City desires to strengthen this restriction by making it applicable to flights having "ultimate" destinations. If this were to be done, it would clearly discriminate against Braniff Airlines, as well as other interstate carriers, because Southwest Airlines is an intrastate carrier. Therefore, if this change were to be made, we would have to recommend against its adoption.

3. Impose a curfew on scheduled commercial air carrier operations at Hobby Airport the effect of which would restrict flights into and out of the airport during the hours from 8:00 p.m. to 6:00 a.m. While it is true that

a few airports in the United States have found it necessary to impose this type of curfew because of the threat of ruinous litigation, our feeling is that the curfew, if allowed to proliferate, will ultimately have a deleterious affect on the National Aviation System because of its "ripple" effect. The Federal Aviation Administration is now making a general study of curfews to see what steps can be taken to minimize the many serious problems that inevitably arise as the use of curfews become more widespread. For this reason, we consider the proposed curfew at Hobby Airport as premature and, therefore, would strongly recommend against its adoption at this time.

I greatly appreciate this opportunity to give you my thoughts on the matter. I hope the foregoing will be of some assistance to you.

Sincerely,

Original Signed By
Henry H. Newman

Director

Appendix E

Economic Impact of Night Curfews at Airports

10 March 1972

From: EC-200 [FAA Director of Aviation Economics]

To: EQ-1 [FAA Director of Environmental Quality]

Subj: Economic Impact of Night Curfews at Airports

The airlines, the airport operators, and the public who use air transportation would be significantly affected by the imposition of night curfews at United States airports. Utilization would drop particularly in the larger long-haul aircraft. Capacity in high density markets would decrease and peaking at the major airports would be intensified. The result would be increased costs to the airlines, increased airport delays, and increased prices for the purchase of air transportation.

In order to measure the impact of an eight-hour curfew on the airline industry, an analysis of the November 1971 Official Airline Guide Schedule Tape was completed. The 141 U.S. airports enplaning 100,000 or more air carrier passengers in 1970 were examined in detail. These airports accounted for over 95 percent of the total U.S. passenger traffic. Ten percent of the air carrier operations at these airports occurred during the period 2200-0559 local time.

Table 1 is a summary of the night operations by type of service ranked by airport. The top five airports experienced 763 night operations which were 29 percent of the total. The top 15 airports represent over 50 percent of the total night operations. This table highlights the high concentration of total night operations at a few key airports and also the relative magnitude of night operations at these locations. Cargo operations at five stations accounted for 41 percent of the total night cargo

flights. At these five airports, 62 percent of the total cargo frequencies operated at night.

ALL-CARGO FREQUENCIES
AT TOP FIVE AIRPORTS

	2200-0559	Daily	Night as Percent of Day
ORD (O'Hare)	103	157	66
JFK (Kennedy)	76	132	58
LAX (Los Angeles)	44	81	54
DTW (Detroit)	38	62	61
EWR (Newark)	32	42	76
	293	474	62%

Significant international night operations occur at only two airports — JFK with 21 and RNL with 10. This is 60 percent of the total international night flights for all the airports, but represent only 11 percent of the total daily operations at these two airports.

The following table is the percent distribution of total night operations by type of service:

Domestic Trunk	50%
Cargo	27%
Local Service	19%
International	2%
Commuter	2%

Any supplemental or commuter airline that does not publish a schedule in the Official Airline Guide is not included in these counts.

Table 2 is a summary of the U.S. air carrier production of scheduled frequency and revenue airplane miles flown by passenger aircraft, for domestic trunk and local service airlines showing night operations as a percent of total day. This table highlights the longer average stage-

length of night operations versus the stage length for total daily operations. Ten percent of the operations occur during curfew, however, 13 percent of the revenue miles flown occur during this period. Tables 3, 4, 5, and 6 contain the detail back-up by carrier for Table 2. Fourteen percent of the domestic trunk revenue passenger airplane mileage flown — close to 18 percent of the service over 1,000 miles — would be curtailed or forced to be rescheduled by the imposition of airport curfews. This would imply a significant drop in average aircraft utilization and eventually require an increased fleet size to provide the necessary lift to accommodate the demand for air transportation. These increased equipment costs would have to be passed on to the airline passenger.

Tables 3 and 5 also reflect the large amount of off-peak flying in night coach service offered by Delta and Eastern Airlines.

Exhibit 1 is a graph of the hourly distribution of the 1,000 daily operations scheduled at Los Angeles International Airport. Assuming that we could reschedule all the night operations such that each hour during the 0600-2159 time span would be approximately equal, we would increase the number of operations in all but three hours during the day.

Exhibit 2 reflects this revised hourly distribution of the 1,000 daily operations at Los Angeles.

Table 7 lists the number of flights by destination that would have to be rescheduled at Los Angeles in order to comply with a *national* curfew. This number (223 flights) is greater than shown in Table 1 (134) because it includes flights that fall within the 0600-2159 time span at Los Angeles but violates the curfew at the destination point. This table reflects the concentration of night operation to a limited number of destinations.

Table 8 examines the passenger schedules between Los Angeles and Chicago O'Hare Airport. There are four competitors certificated to fly nonstop between Los Angeles and Chicago. Table 9 summarizes by hour the 42 flights and over 7,500 seats being offered daily in this market. Approximately 34 percent of the eastbound and 20 percent of the westbound capacity would be affected by a curfew. This is visually portrayed by Exhibit 3. The effective curfew hours at Los Angeles for Chicago flights are: eastbound departures 1600-0559 and westbound arrivals 2200-0759.

The Air Transport Association, as well as others, have expressed concern about the possibility of airport curfews being imposed and their impact on the industry. These data would seem to indicate that curfews would have a profound economic effect. A number of airlines currently have computer models which are capable of developing airline schedules. We would recommend that the ATA pursue this further and establish an airline committee which could utilize these existing models. With this capability, it would arrive at more precise data on additional industry fleet requirements, reduced capacity, increased costs of operation, and additional airport facility requirements as a result of airport curfews.

/s/ Herbert J. Guth

HERBERT J. GUTH
Director of Aviation Economics

(Tables omitted in printing)